

**IN THE COURT OF  
APPEAL AT NAIROBI**

**CORAM: KIAGE, JA (IN CHAMBERS)**

**CIVIL APPLICATION NO. NAI. E359 OF  
2025**

**BETWEEN**

**SBM BANK (KENYA) LIMITED.....APPLICANT**

**AND**

**AFRASIA BANK LIMITED.....RESPONDENT**

*(An application for extension of time to file a Notice of Appeal and apply for leave to appeal against the Judgment and Decree of the High Court at Nairobi (Wilfrida Okwany, J.) dated 21<sup>st</sup> July 2022*

*in*

***Misc. Appln. No. E386 of  
2021)***

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**RULING**

The applicant filed a Notice of Motion dated 13<sup>th</sup> June, 2025 seeking the following orders, in the main;

***“ii. THAT this Honourable Court be pleased to extend time within which the applicant may file and serve the Notice of Appeal herein attached on the respondent with respect to the Judgment and Decree of Honourable Lady***

***Justice Wilfrida Okwany delivered on 21<sup>st</sup> July  
2022 in Misc. Application No. E386 of 2021.***

**iii. THAT upon extension of time as prayed for in (ii) above, the Notice of Appeal attached hereto and served on the Respondent be deemed to have been duly filed and served.**

**iv. THAT this Honourable Court be pleased to extend time within which the applicant may apply for leave to appeal to this Honourable Court from the Judgment and Decree of Honourable Lady Justice Wilfrida Okwany delivered on 21<sup>st</sup> July 2022 in Misc. Application No. E386 of 2021.”**

The application before me is premised on grounds on the face of it and is supported by an affidavit sworn on 13<sup>th</sup> June 2025 by **Kevin Kimani**, a legal officer with the applicant. It is averred that the applicant by an application dated 12<sup>th</sup> March 2025, prayed for extension of time to file and serve the Notice of Appeal and upon such extension the same be deemed to be duly filed and served. The applicant also sought extension of time to apply for leave to appeal to this Court and upon such extension of time, the application for leave to appeal be deemed to be duly filed and served and it be granted leave to appeal from the judgment of Hon. Lady Justice Wilfrida Okwany. Upon consideration of the application and parties' documents, W. Karanja, J.A delivered a ruling on 9<sup>th</sup> June 2025, striking out the said application on the

ground that it was omnibus

in nature, in that it comprised prayers amenable to determination by a single judge, that is, extension of time, as well as a prayer for leave to appeal, jurisdiction over which lies exclusively with a full bench of the Court. It is averred that the delay in filing the present application was occasioned by; the amended order introducing the requirement for leave, time taken for the determination of Civil Appeal No. E620 of 2022, which was struck out on 28<sup>th</sup> February 2025, and the application for extension of time which was subsequently struck out by Karanja, JA

The application is opposed through a replying affidavit sworn on 14<sup>th</sup> July 2025, by **Navin Ramdoyal**, Head of International Corporate (Africa) of the respondent. Some of the averments in the extensive 72 paragraphed affidavit too long by in the circumstances, address the intended appeal itself and therefore they are inconsequential to this application. It is deposed that the present application is *res judicata* for the reason that the applicant had sought similar orders in an earlier application dated 12<sup>th</sup> March 2025, which was struck out the Karanja, J.A. The learned Judge's finding that she lacked procedural jurisdiction to hear the matter, on

the basis of the omnibus prayer is defended. The respondent avers

that the present application is founded on a triplicity of Notices of Appeal. Further, the **Arbitration Act** requires in mandatory terms that an appeal under **section 39(4)** of the **Arbitration Act** must be filed within the time limit prescribed by the Court of Appeal rules, the said timeline being within 60 days after the date when the notice of appeal was filed. The respondent continues that the **Arbitration Act** and the **Uncitral Model Law on International Commercial Arbitration 1985** (the Model Law) to which Kenya is a signatory and upon which the Kenyan Arbitration Act is modelled, do not provide for or permit any extension of time. Further, the 60 day period stipulated in **rule 84(1)** of the **Court of Appeal rules** having lapsed, any right to apply to set aside the High Court's judgment in respect of an arbitral award is lost and cannot be revived by resorting to the Court's power to extend time. It is urged that it is unconscionable for the Notice of Appeal which relied on by the applicant, dated 12<sup>th</sup> June 2025, to be filed on 13<sup>th</sup> June 2025, three years after delivery of the judgment. Moreover, the applicant had earlier filed a Notice of Appeal dated 3<sup>rd</sup> August 2022 and a Record of Appeal matter was fully heard and determined on its merits by a 3 Judge bench of this

Court. Vide a judgment delivered on 28<sup>th</sup> February 2025, the appeal

was struck out with costs. On reliance of the Supreme Court decision in **SALAT Vs. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS [2014] KESC 12 (KLR)** it

is urged that admitting the applicant's third notice of appeal, without leave of court, was tantamount to endorsing an illegality.

The respondent contends that the applicant has failed to meet the threshold set by the English authority of **ALI ALLAWI AND TERNA BAHRAIN [2019] EWHC 430** as to (a) Length of delay of three years (b) the absence of any good reason of the delay (c) the sole contribution by the applicant to the delay (d) the extreme prejudice to the respondent by extension of time (e) the arbitration not having taken place during the period of delay (f) the grounds for setting aside the judgment of the High Court being untenable (g) there would be not unfairness in refusing an extension of time. The applicant is faulted for failing to object to the 'file closed' orders issued by the High Court on 20<sup>th</sup> September 2022. Further, the orders sought by the applicant are prejudicial to the respondent as they will frustrate its right to enjoy the fruits of the High Court judgment and decree delivered on 21<sup>st</sup> July 2022.

The applicant responded to the respondent's averments through a further affidavit sworn on 22<sup>nd</sup> July 2025, by **Kevin Kimani**, and written submissions filed by **Walker Kontos Advocates**, dated 8<sup>th</sup> July 2025. On the issue of *res judicata*, the applicant clarifies that Civil Appeal No. E620 of 2022 was struck out by a judgment of 28<sup>th</sup> February 2025, on grounds that the same was filed without leave as prescribed by **section 39(4)** of the **Arbitration Act**. Similarly, Civil Application No. E170 of 2015 was struck out because the application combined reliefs which can be granted by a single Judge and those by the Court as provided under **rule 55(1)** of this Court's rules. It is asserted that the matters were thus never heard and finally decided, and therefore the doctrine of *res judicata* was inapplicable. On the question of jurisdiction, the applicant argues that jurisdiction for extension of time is granted by **rule 4** of this Court's Rules. Moreover, by dint of **section 39(4)** of the **Arbitration Act**, this Court has jurisdiction by virtue of its rules to extend time. It is averred that contrary to the respondent's assertions that the applicant had filed three notices of appeal, the only Notice of Appeal that was lodged with the Registrar was the one that was struck out

with the appeal. The applicant reiterates that the delay was

occasioned by lack of knowledge or information of an amended order having been made to close the file. The applicant had filed an appeal in the belief that the suit before the High Court had been stayed, and all proceedings were under the Civil Procedure Act which grants a right of appeal, only to be confronted with an amended order showing that the file was closed and introducing the requirement of leave.

The applicant identified the principles upon which the Court grants extension of time for appeal as outlined in **SALAT Vs. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**

**& 7**

**OTHERS** (supra), that is the length of delay, the reason for delay,

the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. On the length of delay, the applicant explained that although the appeal against the impugned judgment was made on time, the same was struck out on 28<sup>th</sup> February 2025 for lack of certification by the Court of Appeal. The applicant proceeded to apply for extension of time within 14 days, on 12<sup>th</sup> March 2025, but

the application was struck out on 9<sup>th</sup> June 2025. Five days later,  
the  
present application was made. It was urged that the application  
had

been made expeditiously and without delay. The applicant submits that the appeal has chances of succeeding because it raises points of general public importance. Further, there is no prejudice to the respondent if leave is granted as its right is preserved.

In further opposition to the application, the respondent lodged written submissions dated 3<sup>rd</sup> September 2025, through **Githii & Co. Advocates**. The submissions are a replication of the replying affidavit, I therefore find not need rehash the assertions therein.

The principles to be considered by the Court in exercising the discretion on whether to extend time, delineated by Supreme Court's decision in **NICHOLAS KIPTOO ARAP KORIR SALAT Vs. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7**

**OTHERS** (supra), are cited.

Enlargement of time under **rule 4** lies in my discretion to be exercised judicially in accordance with sound principle, not out of whim, caprice or sympathy. More importantly, my considerations are to be guided by the laid down parameters as espoused in many decisions of this Court and authoritatively by the Supreme Court in **NICHOLAS KIPTOO ARAP KORIR SALAT** (supra).

I have considered the rival contentions by parties. To begin with, the respondent urged that the present application is *res judicata* following W. Karanja's ruling of 9<sup>th</sup> June 2025, where she struck out the application dated 12 March 2025, for seeking prayers that were the preserve of a single Judge and the full bench all together. However, I note that in the said ruling, the learned Judge did not determine the applicant's application on the merits of the sought extension of time, but struck it out and correctly so in my respectful view, for being an omnibus application. That being the case, I would resist the invitation to reject the application on the false basis of it being *res judicata*.

Turning to the merits of the application, the applicant attributes the delay to its filing an appeal on the belief that the suit before the High Court had been stayed, and all proceedings were under the Civil Procedure Act, which grants a right of appeal; only to be confronted with an amended order showing that the file had been closed and thus introducing the requirement of leave. It is also urged that the applicant expeditiously moved this Court without delay. The appeal against the impugned judgment was made on time, the same

was, however, struck out on 28<sup>th</sup> February 2025, for lack of

certification by this Court. The applicant proceeded to apply for extension of time within which to seek certification, within 14 days on 12<sup>th</sup> March 2025, but the application was struck out on 9<sup>th</sup> June 2025. Five days later, on 13<sup>th</sup> June 2025, the present application was made.

I have given serious consideration to this matter as it seems to me obvious that the applicant cannot be accused of indolence or lack of keenness in the pursuit of appellate justice. It is plain to see that it made frantic and sustained efforts to file the appeal and to seek extension of time where needed. Its undoing, however, seems to be that some of the steps it took were procedurally erroneous leading to the striking out of both the appeal and the application for extension of time. These errors are readily admitted and I think it would be harsh and unconscionable to shut the door to justice to a pleader who has moved the Court in timely fashion but has been beset by mistakes. I would rather take the adage that it is human to err and mistakes will always happen. My role as a judge is to do justice between the parties, and not to wield the big stick of discipline.

Be so minded, I am persuaded that the reasons proffered by the applicant are plausible. The delay is also satisfactorily explained. I am thus inclined to exercise my discretion in favour of the applicant. I do so well aware that the respondent has raised issue with whether time can be extended when leave to appeal is yet to be granted. My way of thinking is that the answer to that concern is provided by **Rule 77(4)** of our Rules which provides thus;

***77. (4) When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal."***

In the result, I allow the application as prayed. The applicant shall file and serve the application for leave to appeal within seven **(7) days** of today.

The costs shall abide the outcome of the appeal.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of October, 2025**

**P. O. KIAGE**

.....  
..... **JUDGE OF  
APPEAL**

I certify that this is  
a true copy of the  
original.

***Signed***

**DEPUTY REGISTRAR**