

**IN THE COURT OF APPEAL
AT NAIROBI**

[CORAM: SICHALE JA (IN CHAMBERS)]

**CIVIL APPEAL (APPLICATION) NO. 174 OF
2020**

BETWEEN

**LOISE NELIMA THIGA.....1ST
APPLICANT ROBINSON WANGOME
THIGA.....2ND APPLICANT GEOFFREY
WACHIRA THIGA.....3RD APPLICANT**

AND

BECKY NJOKI THIGA.....RESPONDENT

*(Being an Application to file an Appeal out of Time from the
Judgment of the Court of Appeal S.Ole Kantai, F.Tuiyot & M.
Gachoka JJ.A dated 11th October 2024)*

RULING

1. **Loise Nelima Thiga, Robinson Wangome Thiga and Geoffrey Wachira Thiga** (*“the applicants”*) herein, have by the motion on notice dated **5th March 2025**, brought pursuant to the provisions of **Rule 4, 5 (b), 41, 43 and 55 of the Court of Appeal Rules 2022 and all enabling provisions** invoked the jurisdiction of this Court sitting as a Single Judge seeking the

following orders;

“i. This Honourable Court be pleased to grant leave to Appeal (to the Supreme Court) out of time against the judgment of the Honourable Court, delivered on 11th

October 2024 by Honourable Justices S.Ole Kantai, F. Tuiyot and M. Gachoka JJ.A, in Civil Appeal No. 174 of 2020.

ii. The costs of this application be in the Estate.”

2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by **Edward C. Asitiba**, Counsel who has the conduct of this matter on behalf of the applicants who deposed *inter alia* that they were aggrieved by the judgment of the Court of Appeal delivered on 11th October 2024 and that they had filed a Notice of Appeal on 30th October 2024, relying on working days as opposed to calendar days in their computation of the time frame for filing of the Notice of Appeal.
3. He further deposed that the delay was inadvertent and was regretted but was a procedural technicality which Article 159 (2) (d) of the Constitution seeks to guard against and effectively address and that further, they were highly apprehensive that the respondent would proceed and obtain Grant of Letters of Administration pursuant to the judgment of the Court of Appeal, hence, rendering their intended appeal to the Supreme Court nugatory.

4. It was submitted for the applicants that they had no intention of filing this appeal out of time but the same was due to an unfortunate mistake occasioned by wrong computation of time and that there was no unreasonable delay as they filed the same on 30th October 2024, which was only 4 days after the date they were supposed to file the same.
5. It was further submitted that the respondent would not be prejudiced in anyway if the instant motion was allowed.
6. On the other hand, it was submitted for the respondent that the appellants had lodged their Notice of Appeal out of time and without first seeking leave of the Court of Appeal bench, thus rendering the same incompetent.
7. That, they then compounded this error by waiting until 5th March 2025, to file the present application which was over 4 months after lodging the defective Notice of Appeal on 30th October 2024 and no credible explanation had been provided for by the applicants on this prolonged period of inaction.
8. It was further submitted that the applicants' only justification was that they miscalculated time by relying on working days instead of calendar days and that even if such a miscalculation were to

be

accepted, they still had adequate time within the statutory period to file a Notice of Appeal, but did not do so which conduct was inexcusable.

9. I have carefully considered the motion, the grounds thereof, the supporting affidavit, and the rival written submissions by the parties, the cited authorities and the law.

10. The applicants herein are seeking leave to appeal out of time against a decision of this Court (*S. Ole Kantai, F. Tuiyot & Mwaniki Gachoka JJ.A*), to the Supreme Court.

11. Section 15 (1) of the Supreme Court Act CAP 9B of the Laws of Kenya provides that appeals to the Supreme Court shall be heard only with the leave of the Court. Subsection 1 thereof however does not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.

12. Section 2 of the Act further defines the “Court” thus; **“Court means the Supreme Court of Kenya as established under Article 163(1) of the Constitution.” (Emphasis supplied).**

13. Rule 4 of the Court of Appeal Rules 2022, that the applicants

have sought to rely on in support of their application deals with appeals to this Court from the lower courts and not to the Supreme Court.

14. It is therefore quite evident that the orders sought by the applicants are not tenable and this Court does not have the jurisdiction to grant the same.

15. Indeed, faced with a similar application in the case of **Otieno v Ngani Civil Application No.67 of 2018**, a full Bench of this Court *Makhandia, Nyamweya & Kimaru JJ.A*, rendered themselves thus: ***“Back to the application, it is evident that the applicant wishes to exercise his undoubted right of appeal provided for in Article 164 (4) of the Constitution. Under that Article, appeal from this Court to the Supreme Court lie as of right where they involve interpretation or application of the Constitution. However, all other appeals must meet the strictures set thereunder; that this Court’s or the Supreme Court’s certification must first be obtained before the Supreme Court hears them. The other stricture or requirement is that the intended appeal must raise a matter of general public importance, which this Court or the Supreme Court must certify. On the first issue, the applicant has relied on rule 4 of***

this

Court's Rules as the main foundation of the prayers for leave.

However, our understanding is that rule 4 of this Court's Rules, 2022 deals with appeals to this Court from the lower courts and not to the Supreme Court. This rule grants this Court the jurisdiction and discretion to extend the time for doing any act authorized or required by the Rues but it does not extend to appeals to the Supreme Court. We say so bearing in mind the holding in the case of Kenya Revenue Authority & 2 Others v Mount Kenya Bottlers & 4 Others [2022] KESC 3 (KLR) in which the Supreme Court emphasized that the extension of time for filing an appeal to the Supreme Court must be sought under the Supreme Court Rules, 2020 and not under the Court of Appeal Rules.

Further, in Patel v Lagat (supra), this Court clarified that its jurisdiction to extend time is limited to appeals within this Court and does not extend to appeals to the Supreme Court. These cases illustrate therefore that while this Court has the jurisdiction and indeed, power to extend time for appeals within its jurisdiction, any extension of time for appeals to the Supreme Court must

be sought under the relevant provisions

of the Supreme Court Rules. This in essence means that such

an application can only be entertained by the Supreme Court and not any other court, this Court included.

We confidently say so because the Supreme Court Rules can only be invoked and applied by that court and not any other.”(Emphasis added).

16.I fully agree with the reasoning by the Court in the above decision that I have cited. I think I have stated enough as to why the orders sought in the instant application cannot issue.

17.The upshot of the foregoing is that the applicants’ motion dated **5th March 2025**, is incompetent and the same must fall by the wayside.

18.It is accordingly struck out with costs to the respondent.
It is so ordered.

Dated and delivered at Nairobi this 21st day of November, 2025.

F. SICHALE

.....
... JUDGE OF APPEAL

I certify that this is

*a true copy of the
original.*

Signed

DEPUTY

REGISTRAR.