

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO. E062 OF 2023

NATIONAL BANK OF KENYA LTD.....
APPELLANT

VERSUS

GIDEON ROTICH KITIYO.....
.....RESPONDENT

RULING

1. The applicant (Gideon Rotich Kitiyo), has approached this Court through a notice of motion dated 27th Mach 2025, seeking the following orders:
 - a. That the application be certified urgent and be heard on a priority basis.
 - b. That M/s Luchivya & Co. Advocates be granted leave to come on record for the respondent/applicant.
 - c. That the applicant be granted leave to file and serve a notice of appeal out of time.
 - d. That costs of the application be in the cause.
2. The application is supported by the grounds on its face and by the supporting affidavit sworn by Gideon Rotich Kitiyo. The Applicant states that:
 - a. Judgment was delivered on 30th January 2025.
 - b. He was dissatisfied with the said judgment and instructed his then advocate to lodge a notice of appeal.

- c. He later discovered that the said counsel had not filed the Notice of Appeal and had no intention of continuing with the matter.
 - d. He attributes the delay to a misunderstanding with previous counsel, the time taken to retrieve the file, and his own work-related commitments that delayed timely follow up. He has since engaged new counsel who requires leave to come on record.
 - e. He argues that the delay is neither deliberate nor inordinate, and that the Respondent will not suffer any prejudice if the orders sought are granted.
 - f. He contends that the intended appeal raises arguable and non-frivolous issues.
3. The main issue for determination is whether the Applicant has satisfied the legal threshold for extension of time to file a Notice of Appeal out of time.
 4. The Court has unfettered discretion under Order 50 Rule 6 and 7 of the Civil Procedure Act and Rules to extend the time of complying with Procedural dictates of filing, amendment, direction, order or appeal on a decision of the Court even if the stipulated time for compliance has since lapsed.
 5. The matters the Court has to consider is articulated in the case of **Joseph Mweteri Igweta v Mukira M'Ethare & Another Civil Application No. 8 of 2000 where Lakha J. A** stated as follows:

“The application made under Rule 4 of the Rules is to be viewed by reference to the underlying principles of justice. In applying the criteria of justice, several factors ought to be taken into account. Among these factors is the length of delay, the explanation for the delay, the prejudice of the delay, the explanation for the delay, the merits of the appeal (without holding a mini appeal), the effect of the delay on public administration, the importance of compliance with time limits bearing in mind that they were there to be observed and the resources of the parties which might, in particular, be relevant to the question of prejudice. These factors are not to be treated as a passport to parties to ignore time limits since an important feature in deciding what justice required was to bear in mind the time limits were there to be observed and justice might be seriously defeated if there was laxity in respect of compliance with them.”

6. The principles for extension of time for filing appeal were settled by the Supreme Court in **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR** where it upheld its earlier decision in **Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)** as follows :

“ As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.... we derive the following

as the underlying principles that a Court should consider in exercising such discretion:

- a. Extension of time is not a 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 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. where there is a reasonable cause for the delay, [the same should be expressed] to the satisfaction of the Court;**
- e. whether there will be any prejudice suffered by the respondents, if 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**

7. This courts considers the following factors to establish merit:

- a. The length of the delay.
- b. The reason for the delay.
- c. Whether the intended appeal is arguable.
- d. Whether the Respondent will suffer prejudice.
- e. Whether the application has been brought without undue delay.

8. Judgment was delivered on 30 January 2025. The statutory 14 days for filing the notice of appeal have lapsed. From the material presented, the delay is relatively short and not excessive.

9. The Applicant attributes the delay to miscommunication and breakdown of engagement with his previous counsel, time taken to retrieve the file and his is work related commitments. The court is satisfied that these reasons are plausible and sufficiently explained. Mistakes or failures by counsel should not always be visited on a litigant, especially where the litigant demonstrates diligence once the problem is discovered. A mistake or omission, or negligence of a legal counsel failure to fulfil legitimate expectations and to make informed choices appropriately tailored to comply with procedural timelines can be taken into account as a relevant consideration. In **Attorney General v Keron Mathews {2011} UKPC 38** held that:

“Timeliness in conducting litigation must be observed by a litigant but an attorney’s error can be a good reason for missing a deadline and applying for an extension of time to appeal, however the applicant must show that the delay was substantially due to the conduct of the attorney and the litigants must show some degree of vigilance in protecting their own interest. Factoring to make at least perceptive enquiries with an attorney can result in the Court being of the view that the attorney’s conduct may have contributed to the delay, but it was not the substantial reason.”

10. The Applicant asserts that the intended appeal is not frivolous. At this stage, the Court is not required to determine the merits of the

intended appeal but only to be satisfied that it is not frivolous. Nothing before the Court indicates that the intended appeal is hopeless. The requirement for the consideration of whether an intended or proposed appeal has any chances of success appear to have its support in the case of **Bhaichan Ghagwanji Shah v Jamnadas & Company Ltd {1959} EA 838** where the Court said:

“It is essential in my view that, an applicant for an extension of time under Rule 9 should support his application by a sufficient statement of the nature of the Judgment and of his reasons for desiring an appeal against it to enable the Court to determine whether or not a refusal of the application would appear to cause an injustice.”

11. The Respondent has not demonstrated what prejudice, if any, he stands to suffer if leave is granted. The Applicant still has time within the sixty day window for lodging the Record of Appeal. Any prejudice can be compensated by costs.
12. **Article 159 (2)(d) of Constitution of Kenya 2010** states that in exercising judicial authority, courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities. This means that courts should not let minor procedural errors prevent them from reaching a fair decision on the substance of a case. The principle aims to ensure that justice is not

delayed or denied due to strict adherence to rules that are not essential to the core issues of a dispute.

13. In the circumstances, the Court finds that it is in the interest of justice to exercise its discretion in favour of the Applicant.

Conclusion

14. Having considered the application, the supporting affidavit, the law and the circumstances of the case, the Court finds merit in the application.

Orders

15. Leave is hereby granted to M/s Luchivya & Co. Advocates to come on record for the Applicant/Respondent.
16. The Applicant is granted leave to file and serve the Notice of Appeal out of time.
17. The Notice of Appeal shall be filed and served within seven(7) days from the date of this ruling.
18. Costs of this application shall be in the cause.
19. Right of Appeal 30 days explained.
20. Mention on 24.6.2026 for directions.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 20th DAY OF NOVEMBER, 2025.

S. N MBUNGI

JUDGE

In the Presence of:-

CA: Angong'a

Ms Ogoda for the Appellant present online.

Luchivia for Respondent, absent