

**IN THE COURT OF
APPEAL AT NAIROBI**

**[CORAM: SICHALE JA (IN
CHAMBERS)] CIVIL APPLICATION**

NO. E238 OF 2025

**ALEX ROY OLEMBO.....1ST
APPLICANT STEPHEN OWINO.....**

.....2ND APPLICANT

-VERSUS-

JOHN CHEGE.....RESPONDENT

*(Being an Application for Extension of Time to file and serve
Record of Appeal in an intended Appeal from the Judgment and
decree of the High Court of Kenya (J.N Njagi J), dated 19th May
2023*

In

(Nairobi High Court Civil Appeal NO. 497 of 2018)

RULING

1. Before me is the motion on notice dated 11th April 2025,
brought pursuant to the provisions of **Rule 4 of the Court of
Appeal Rules 2010** and all other enabling provisions of
the Law, in which **Alex Roy Olembo** and **Stephen Owino**
(“the applicants” herein), seek the following orders;

“i. Spent.

ii. THAT this Honourable Court be pleased to

***extend the time within which the applicant may
file the Record of Appeal in this matter.***

iii. THAT costs of this application be in the cause.
iv. THAT the Honourable Court be pleased to grant any other relief it deems fit.”

2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by **Stephen Owino**, an Advocate of the High Court of Kenya who has the conduct of this matter on behalf of the applicants who deposed *inter alia* that, being aggrieved with the decision delivered by *Njagi J*, on 19th May 2023, they filed a Notice of Appeal dated 22nd May 2023, signifying their intention to challenge the same.
3. That, he assigned the case to a former associate of the firm, one Absalom Osodo, entrusting him with the preparation and filing of the Record of Appeal, and he assured him that he had diligently prepared the Record and that it was ready for filing, and that relying on these representations, he transferred the requisite filing fees to him via *M-pesa*.
4. He further deposed that at all times, his law firm operated under the genuine and reasonable belief that the appeal had been filed and that during a routine review of the CTS portal after Mr. Osodi's

services were terminated, he discovered that although the appeal had been uploaded, no case number had been generated.

5. That, upon further inquiry, it became clear that the reason why no case number had been issued was because Mr. Osondo had failed to remit the requisite filing fees to the court, despite having received the same from him, and he subsequently reported his criminal conduct of stealing by servant at Central Police Station on 26th February 2025.
6. The motion was opposed vide a replying affidavit sworn by the respondent on **16th July 2025**, who deposed *inter alia* that his counsel was served with the Notice of Appeal on 31st May 2023 and that from 31st May 2023, the applicants went into slumber, and he sincerely believed that the applicants had abandoned further litigation.
7. He further deposed that at all times both in the lower and the high court, the deponent in the supporting affidavit in support of the motion (Mr. Owino), was the one appearing for the applicants, and he cannot now be heard to blame his former associate for allegedly ***“stealing”*** filing fees.

8. It was submitted for the applicants that the intended appeal raises weighty and arguable issues of law and fact with high chances of success necessitating consideration by this Court
9. That, further the applicants had sufficiently explained the circumstances surrounding the delay by demonstrating that it was neither inordinate nor due to inaction or laxity and that the same was due to the fact that, the person who was entrusted with the responsibility to file the appeal left the employ of the law firm representing the applicants and that it was only during the review of the CTS portal in January 2025, to follow up on the status of the appeal, that it was discovered that the appeal had been lodged but had not been paid for.
10. On the other hand, it was submitted for the respondent that no explanation had been given as to why it took the applicants over 2 years to realize that the Record of Appeal had not been filed and that further that the Court had not been told when the said associate left the firm and that there was inordinate delay in filing of this application, more than 5 months after the discovery of the alleged embezzlement by the associate.

11. It was further submitted that it is trite law that litigation must come to an end and that granting the application would be prejudicial to the respondent.
12. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival submissions by the parties, the cited authorities and the law.
13. The principles upon which this Court exercises its discretion pursuant to Rule 4 to extend time or not are now old hat. The Court has wide and unfettered discretion in deciding whether to extend time or not. However, in exercising its discretion, the Court should do so judiciously.
14. See **Patel vs. Waweru & 2 Others [2003] KLR 361 at pp. 362-3** where this Court had the following to say in respect to Rule 4 of the Court of Appeal Rules;

“This is a matter in which the learned single Judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single Judge explaining the reason for what was clearly an inordinate delay. How does a single Judge exercise his discretion” In LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI - Civil Application no. NAI. 251 of 1997 this Court stated:-

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted”

15. In the instant case and as regards the length of the delay, the impugned judgment was delivered on **19th May 2023**, and the applicants promptly filed a Notice of Appeal on 22nd May 2023, which was well within time.

16. Additionally, the same was served on the respondent on 31st May 2023, which was well within time and the respondent therefore, has all along been aware of the applicants’ intention to appeal against the impugned judgment.

17. The instant application was subsequently filed on **11th April 2025**.

There has therefore been a delay of almost **2 years**, from the date of the judgment, which delay I do not consider to be inordinate from the circumstances of this case.

18. Turning to reasons proffered for failing to file the appeal on time, it was contended that the same was due to inaction by

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Absalom Osodo, an associate working for the firm acting for the applicants who failed to pay for the Record of Appeal despite having lodged the same and despite filing fees having been duly sent to him via *M-pesa*.

19. I consider the reasons given for failure to file the appeal on time to be reasonable for the following reasons; firstly, I note that the Notice of Appeal was filed on 22nd May 2023, which was within time. Additionally, the Notice of Appeal was served on the respondents on 31st May 2023, which again was well within time.

20. Secondly, the contention by Mr. Stephen Owino counsel who has the conduct of this matter on behalf of the applicants that the matter had been assigned to a former associate of the firm who was entrusted with preparation and filing of the Record of Appeal and who had assured him that he had diligently prepared the Record of Appeal and that relying on these representations he transferred the requisite filing fees to him via *M-pesa* only to realize later that he had not remitted the filing fees whereupon he subsequently reported his criminal conduct of stealing by servant at Central Police Station on 26th

February 2025, remained largely uncontroverted.

21. The applicants have indeed annexed OB number 28 of 26/02/25, evidencing that indeed the matter had been reported to the police and the Court further notes that the Record of Appeal had all along been lodged, only that it had not been paid for.

22. Given the circumstances of this case, I consider the reasons given for failing to file the appeal on time to be plausible/reasonable and ultimately, therefore, I am of the considered opinion that the delay herein has sufficiently been explained to the satisfaction of this Court as it is trite law that mistakes of counsel should not be visited upon an innocent litigant.

23. As to the arguability or otherwise of the intended appeal, I cannot make a determination of this issue sitting as a Single Judge and I will therefore not delve into the issue.

24. Finally, on prejudice, I am satisfied that the applicants will stand to suffer prejudice if the instant motion is not allowed, as they will have been completely ousted from the seat of justice.

25. Taking into totality all the circumstances of this case, I am of the considered view that the applicants have demonstrated

and satisfied the existence of the principles for consideration
in the

exercise of my unfettered discretion pursuant to Rule 4 of this Court to extend time.

26. Accordingly, the applicants' motion dated **11th April 2025**, is merited and the same is hereby allowed as prayed.

27. The applicants shall proceed to file the intended appeal within a period of 30 days from the date of this ruling, failure to which these orders shall stand vacated.

28. The costs of this motion shall abide the outcome of the intended appeal.

It is so ordered.

Dated and delivered at Nairobi this 19th day of December 2025.

F. SICHALE

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

*I certify that this is a
True copy of the original
Signed*
DEPUTY REGISTRAR