

**IN THE COURT OF
APPEAL AT
KISUMU**

**(CORAM: KIMARU, JA (IN
CHAMBERS) CIVIL APPLICATION NO.
E128 OF 2025 BETWEEN**

**THE CHIEF OF KENYA DEFENCE FORCES.....1ST APPLICANT
THE HON. ATTORNEY GENERAL.....2ND APPLICANT**

AND

MOSES ETYANG.....RESPONDENT

(Being an application for extension of time for leave to appeal to the Supreme Court from the Judgement of this Court (Asike-Makhandia, Omondi & Kimaru, JJA) dated 31st July, 2025

in

Civil Appeal No. E001 of 2024)

RULING

1. The applicants were aggrieved by the Judgment of this Court which was rendered on 31st July, 2025. They wish to appeal against the said decision to the Supreme Court. **Rule 41(1) (a)** and **42** of the **Court of Appeal Rules** required the applicant to seek the leave of this Court, within **fourteen (14) days** of the delivery of the Judgment, to appeal to the Supreme Court. The applicants did not do so hence the present application made substantially under **Rule 4** of the

Court of Appeal Rules in which they seek enlargement of time to be granted for them to

lodge and serve the notice of appeal out of time as per the requirements of **Rule 36(1)** of the **Supreme Court Rules, 2022**.

2. The applicants explained the reason for delay in lodging the notice of appeal in time to have been occasioned by the resignation of the advocate who had conduct of the case. This resulted in breakdown of communication with the hierarchy in respect of the specific cases that the advocate was handling. The applicants plead with the Court to exercise its discretion in their favour, because, in their view, the intended appeal will raise issues of general public importance that will require consideration by the Supreme Court. The applicants urged that it will be in the interests of justice for the application to be allowed. They pointed out that the respondent will not be prejudice if the leave sought is granted. The application is supported by the annexed affidavit of **G.A. Ajierh**, the advocate for the applicants.

3. The application is opposed. **Julius Etyang**, the respondent swore a replying affidavit in opposition to the application. He deponed that the applicants had not given cogent reasons

why

they failed to follow the strict timelessness provided by the Rules for filing appeal. The respondent swore that he is prejudiced by the delay in resolving this matter because of the medical condition that he is suffering from. He pleaded with the Court to bring his suffering to an end by denying the applicants' application for enlargement of time. He was adamant that the interest of justice tilted in his favour as the matters which the applicants purportedly want to raise on appeal are pure employer- employee relationship issues which does not raise a constitutional issues worthy of consideration on appeal by the Supreme Court. He urged the Court to dismiss the application with costs.

4. This Court has considered the application, the replying affidavit, the written submission filed by both the applicants and the respondent and the authorities that they have relied on. **Rule 4** of the **Court of Appeal Rules** grant this Court unfettered discretion to determine whether or not to enlarge time for any steps to be taken within the period prescribed by the Rules. Although unfettered, this discretion is guided by principles which have been laid down by this Court

in its

various decisions. For instance, in **Fakir Mohamed v. Joseph Mugambi & 2 others [2005] eKLR**, the Court held thus:

“The exercise of this Court’s discretion under Rule 4...is unfettered, there is no limit to the number of factors the Court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chance of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors...”

5. In the present application, the applicants gave the reason for delay in lodging the notice of appeal in time to be the breakdown in communication between the previous advocate on record (who resigned her commission) and the client who was supposed to decide whether or not file the appeal upon delivery of the said Judgment. Immediately the applicants became aware of the Judgment, they filed the present application before this Court. The respondent, as can be expected in the circumstances, was not impressed by the reasons given by the applicants for the delay in

lodging the

notice of appeal in time. The respondent was of the view that the reasons given by the applicants were not excusable.

6. Having considered the facts of this case, this Court is persuaded by the reasons given by the applicants that indeed they were prevented from lodging the notice of appeal in time due to breakdown of communication in the decision-making hierarchy following the resignation of the advocate who was handling this case. This was also reflected in the transition challenge in appointing a new advocate to take over the conduct of the case. The explanation given is excusable. The reasons given by respondent in opposing the application will largely come into play and be considered by the full bench of this Court when determining whether or not to certify the intended appeal by the applicants as suitable for consideration by the Supreme Court. In that regard therefore, the respondent should hold his horses.

7. The application has merit. It is hereby allowed. The applicants are granted enlargement of time to file the notice

of appeal indicating their intention to appeal to the Supreme Court. The

said notice of appeal shall be filed and served within **seven (7) days**. The respondent shall have the costs of the application.

Dated and delivered at Kisumu this 30th day of January, 2026.

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR.

