

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: TUIYOTT, J.A. (IN

CHAMBERS) CIVIL APPLICATION NO.

E429 OF 2025 BETWEEN

THE KENYA NATIONAL HIGHWAY AUTHORITY.....APPLICANT

AND

SBI INTERNATIONAL HOLDINGS (KENYA).....RESPONDENT

(Being an application for extension of time to file a notice of appeal out of time from the Ruling of the High of Kenya at Nairobi (V.M. Mochache, J) delivered on 21st March 2025

in

**Civil Case No. E288 of
2022)**

RULING

[1] The Kenya National Highway Authority (KENHA), the applicant herein, brings this notice of motion application dated 30th May, 2025 seeking the following orders: -

a.

b. THAT this court be pleased to grant the Applicant leave to file Notice of Appeal dated 2nd May, 2025 and consequently upon that grant of leave deem the Notice of Appeal already lodged in the Superior Court as duly filed and served;

c. THAT this court be pleased to grant the Applicant leave to file its Memorandum of Appeal and Record of Appeal out of time and the same to be deemed duly filed and served;

d. THAT pending the hearing and determination of the intended appeal, there be a stay of execution of the Ruling and Order of Hon. Justice V. M. Mochache delivered on 21st March 2025.

[2] In preliminary, this court, when constituted by a single judge, is bereft of jurisdiction to entertain an application under Rule 5(2)(b) of The Court of Appeal Rules. If we must, see the decision in **Kenya Industrial Estates Ltd v Samuel Sang & another [2008] eKLR**).

[3] Regarding the application for extension of time to file the notice and record of appeal, **Eng. Clarence Karot**, a Deputy Director in the Directorate of Development of the applicant corporation, deposes in an affidavit sworn on 30th May, 2025, that the delay in filing the notice of appeal was neither deliberate nor inordinate as the applicant became aware of the impugned ruling way after the period of appeal had lapsed as it was delivered in its absence, notwithstanding that the applicant had participated in the suit and had filed an application for referral

of the dispute to arbitration in accordance with section 6(1) of the Arbitration Act vide chamber summons dated 26th May 2024 which is still pending ruling. The applicant urges this court to grant the orders sought contending that it has an arguable appeal and that no prejudice will be suffered by the respondent.

- [4] The application is opposed by the respondent in a lengthy replying affidavit of **Gilad Mishni**, the Managing Director of the respondent sworn on 5th November, 2025. He contends that: the applicant's application is unsalvageable and beyond any reasonable legal intervention as the applicant is guilty of serious laches in filing the notice of appeal on 2nd May, 2025 against the ruling of 21st March, 2025, which was way outside the period dictated by law; notice was issued for delivery of the ruling; the draft memorandum of appeal does not disclose an arguable appeal, on the contrary all the grounds posited are an abuse of judicial process; and that grant of leave to appeal shall be superfluous, since there is already an order of the High Court dated 18th October, 2024, denying the extension of time for the applicant to file a

Defence and there is no appeal against that order.

[5] Both parties have filed submissions following the lines of what is set out above.

[6] The discretion granted to this court by Rule 4 of the Court of Appeal Rules must be exercised judiciously. Extension of time is an equitable remedy that is only available to a deserving party, at the discretion of the Court. The party seeking extension of time bears the burden of laying a basis to the satisfaction of the court, and the court will consider, *inter alia*; the length of the delay; the reason for the delay; whether there will be prejudice suffered by the respondent if the extension is granted; whether the application is brought without undue delay; and, in some instances, public interest. See **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others, Supreme Court Application No. 16 of 2014 [2014] eKLR.**

[7] The ruling, the subject of the intended appeal, dated 21st March, 2025, was delivered in the absence of the applicant. It is contended by the applicant that this was despite of its participation in the proceedings and a pending chamber summons application seeking to file a Defence out of time. It

only discovered the ruling way after the time for filing an appeal

had lapsed. In contrast, the respondent is emphatic that the application is an abuse of judicial process, for one, because the High Court already declined to grant the applicant leave to file a Defence out of time, which orders have not been appealed against. In addition, the respondent argues that the applicant has not given any plausible reason for the delay nor has it furnished evidence to show when it became aware of the ruling.

[8] The unfiled notice of appeal is dated 2nd May, 2025 and the present application is dated 30th May, 2025. So, the application is brought 56 days from the last day the notice of appeal ought to have been filed and about a month after the notice of appeal was drafted. While the delay in filing the notice of appeal is attributed to the absence of the respondent and counsel when the ruling was delivered, the further delay in bringing the motion has not been explained at all. In addition, the respondent has not told court when it first learnt of the ruling. On another occasion, this inadequate explanation would have been frowned upon. However, the delay is not inordinate and therefore

pardonable. In addition, the respondent has not demonstrated any prejudice it may suffer if time is extended.

[9] In the end, I allow the notice of motion dated 30th May, 2025.

The applicant shall file and serve a notice of appeal together with a record of appeal within forty-five (45) days of this Ruling. Costs of this application shall be in the intended appeal.

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

F. TUIYOTT

.....
JUDGE OF APPEAL

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

Signed

DEPUTY

REGISTRAR.

