

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: TUIYOTT, JA (IN

CHAMBERS) CIVIL APPLICATION NO.

E430 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 and the Record of Appeal out of time from the Ruling of the High Court of Kenya at Nairobi (V.M. Mochache, J.) dated 21st March, 2025

in

**Civil Suit No. E287 of
2022)**

RULING

- [1] In the notice of motion dated 30th May, 2025, the applicant seeks leave of this Court to file an appeal out of time against the decision of **V. M. Mochache, J.** delivered on 21st March, 2025 in Civil Suit No. E287 of 2022.
- [2] **Eng. Clarence Karot**, a Deputy Director in the Directorate of Development of the applicant corporation, swore on even date asserting that the delay in filing the notice of appeal was

neither

deliberate nor inordinate. He explains that he had been advised

by the advocates representing the applicant regarding an *ex-parte* interlocutory judgment delivered on 21st March 2025 by Hon. Justice V. M. Mochache, which ordered it to pay Kshs. 201,323,929.01 plus interest to the respondent. He deposes that the applicant was dissatisfied with the decision and intended to appeal the entire ruling, having already prepared a draft memorandum of appeal. Many arguments are made regarding the merit of the intended appeal but as will be apparent presently the success or failure of the motion may not turn on that point.

[3] Regarding the procedural timeline, he explains that the delay in filing the notice of appeal was not deliberate or inordinate, as the applicant only became aware of the ruling after the appeal period had lapsed because the matter was determined *ex-parte*. He expresses apprehension that the applicant will suffer substantial financial loss and irreparable damage if the order was not granted, particularly since the judgment involved payment out of public funds. Finally, the intended appeal is arguable and not frivolous, raising serious legal issues that necessitated an extension of time in the interest of justice.

[4] **Gilad Mishni**, the Managing Director of the respondent swore a replying affidavit on 3rd November, 2025 in which he deposes that: the applicant had been served with the plaint and summons to enter appearance on 12th May 2023 and entered appearance on 26th May 2023, yet it failed to file a defence within the prescribed fourteen-day period; the respondent's application for a default judgment was filed on 18th October 2024 and entered by the Deputy Registrar on 21st March 2025 because there were no court orders extending the timelines for filing a defence; the applicant's application to refer the matter to arbitration had been dismissed in its entirety by Hon. Justice Mabeya on 18th October 2024, including denial of a prayer to file defence out of time; the applicant was bound by that decision, and since it had failed to appeal or review that ruling for over a year, it could not now fault the Deputy Registrar for entering a default judgment; and, the applicant's intended grounds of appeal are misconceived, illogical, and an abuse of the judicial process, noting that the Deputy Registrar had no discretion to override a judge's decision. With regard to the applicant's claim of being unaware of the proceedings, he states

that a notice was issued on 19th March 2025 informing the parties that the matter would be heard on 20th March 2025 for the entry of an interlocutory judgment. He contends that the applicant was guilty of serious laches and that the intended appeal was not arguable. It is argued that the applicant would not suffer prejudice as the underlying dispute involved a "pay now argue later" framework for completed road works. He concludes by asserting that the settlement of a lawful judgment does not constitute a loss of public funds but rather protection of the fundamental right to access justice.

[5] Both parties have filed submissions which mirror the contentions in their respective affidavits.

[6] The power granted to this Court under **Rule 4** of the Court of Appeal Rules, 2022 to extend time limited for the doing of an act authorized or required by the rules or by the decision of the Court or of the superior court below is discretionary exercisable on well-known considerations which include the length of the delay, the reasons for the delay, (possibly) the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. See **Leo**

Sila Mutiso v Rose Hellen Wangari Mwangi - Civil Application No. Nai 251 of 1997.

- [7] The impugned decision, sought to be appeal against, is dated 21st March, 2025. The applicant's contention that the ruling was delivered in its absence is not challenged by the respondent who, however, argues that the absence was not excusable as parties were duly notified of the date for delivery. The issue of service of the notice was denied by the applicant on the face of the motion. Since there is no evidence of service of the notice, what the applicant asserts is believable.
- [8] It is nevertheless true that the applicant does not state exactly when it learnt of the ruling. Whatever that date may be, the unfiled notice of appeal is dated 2nd May, 2025 and the present application is dated 30th May, 2025. The application is therefore brought about fifty-six (56) days after the last day when the notice of appeal ought to have been filed. A delay which, in my view, is not overly inordinate and is excusable given the plausible reason given as to why the notice was not filed on time.
- [9] Regarding all the arguments made by the respondent in respect to the weakness and futility of the intended appeal,

this is not

occasion for this Court to reflect on the merit of the intended appeal. The respondents will have an opportunity to demonstrate that before the bench that may eventually hear the appeal. Lack of merit of the intended appeal is not a decisive factor, in the circumstances of the case, in determining whether or not to grant extension of time.

[10] In leaning towards allowing the application, it is not lost on this Court that the respondent has not demonstrated that it will suffer weighty, infirming or uncompensable prejudice if leave is granted.

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

The applicant shall within fourteen (14) days hereof file and serve a notice of appeal and within forty-five (45) days of such filing and service, file and serve the record of appeal. 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.