



**Tongkwang & another v Lokere & another (Civil Application  
E077 of 2025) [2026] KECA 32 (KLR) (23 January 2026) (Ruling)**

Neutral citation: [2026] KECA 32 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E077 OF 2025  
JM MATIVO, JA  
JANUARY 23, 2026**

**BETWEEN**

**JULIUS TONGKWANG ..... 1<sup>ST</sup> APPLICANT**

**CHINA NATION AERO TECHNOLOGY INTERNATIONAL ENGINEERING  
CORPORATION ..... 2<sup>ND</sup> APPLICANT**

**AND**

**BENSON LOSIALIMA LOKERE ..... 1<sup>ST</sup> RESPONDENT**

**JACKSON MNANGAT KORII ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for extension of time to file a notice of appeal  
against the judgment and decree of the Environment and Land Court at  
Kitale (C. K. Nzili, J.) dated 17th September 2025 in ELC No. 37 of 2022)*

**RULING**

1. China Nation Aero Technology International Engineering Corporation (the applicant) has approached this Court by way of notice of motion dated 5<sup>th</sup> November 2025 premised on Article 159 (2) (d) of *the Constitution*, sections 3 and 3A of the *Appellate Jurisdiction Act* Cap 9 and Rule 4 of the Court of Appeal, Rules 2022 seeking two substantive reliefs, namely:
  - a. this Honourable Court be pleased to extend the time allowed for filing and serving the notice of appeal and the record of appeal.
  - b. this Court be pleased to extend the time allowed for filing and serving the letter requesting for typed proceedings and the letter requesting for typed proceedings dated 30/09/2015 be deemed as properly filed and served.



2. The applicant is curiously describing itself as the 2<sup>nd</sup> applicant, suggesting the existence of a 1<sup>st</sup> applicant in the application which is a misnomer. The applicant has dragged another party into this application whom it has designated as the 1<sup>st</sup> applicant. The said party is not an applicant in this application nor has he filed any papers. It appears the applicant only copy pasted the names of the parties as appearing in the lower court's records. I decline the temptation to fall into the same mistake and proceed on the basis that there is only one applicant before me.
3. The applicant's application is supported by the grounds on its body and the supporting affidavit sworn on 5<sup>th</sup> November 2025 by Jason Kimani Kimotho, the applicant's advocate on record. The grounds in support of the application are that: (a) being aggrieved by the Judgment delivered on 17<sup>th</sup> September 2025, the applicant duly instructed its advocate to lodge an appeal against the whole Judgment; (b) counsel prepared a notice of appeal and the letter requesting for the proceedings, Judgment and decree both dated 30<sup>th</sup> September 2025 and uploaded the said documents in the judiciary e-filing portal for assessment resulting into two separate invoices; (c) counsel inadvertently paid for the invoice for the letter requesting certified proceedings and mistakenly forgot to pay for the invoice for the notice of appeal; (d) on 1<sup>st</sup> October 2025, counsel through his staff enquired at the registry whether the notice of appeal had been signed and he was informed that the file was in chambers awaiting signature; (e) on 8<sup>th</sup> October 2025 while collecting the notice of appeal counsel was informed that they had not paid filing fees for the notice of appeal; (f) the filing fees was promptly paid but the Deputy Registrar declined to sign the same citing lapse of time; (g) the failure to file the notice of appeal within the prescribed time was not deliberate but was due to mistake of counsel; (h) mistakes of counsel should not be visited on an innocent litigant; (i) the applicant will be prejudiced if it is not allowed to exercise his right of appeal unlike the respondents who will not suffer any prejudice; (j) the applicant's appeal is arguable and deserves to be heard and determined on merits.
4. The application is opposed vide replying affidavit sworn on 9<sup>th</sup> January 2026 by Jeremiah Ongeru Samba, the 1<sup>st</sup> and 2<sup>nd</sup> respondents' advocate on the following grounds: (a) a notice of appeal is only duly filed upon payment of the requisite filing fees and acceptance by the court registry and that preparation and uploading of a document does not in law amount to filing;
  - (b) the requisite fees was paid on 8<sup>th</sup> October 2025 seven days after lapse of the statutory timeline;
  - (c) no satisfactory explanation has been offered as to why the filing fees were not paid on 30<sup>th</sup> September 2025 or even 1<sup>st</sup> October 2025;
  - (d) the delay was not inadvertent, but arose from inexcusable indolence and procedural laxity;
  - (e) service of the notice of appeal dated 30<sup>th</sup> September 2025 does not in law cure the applicants' failure to file the notice of appeal within the prescribed time;
  - (f) the draft memorandum of appeal does not disclose any reasonable or arguable ground of appeal;
  - (g) the respondents will suffer prejudice as it will unjustly delay the enjoyment of the fruits of a valid Judgment.
5. In his submissions in support of the appeal, the applicant's counsel vide submissions dated 15<sup>th</sup> January 2026 reiterated the contents of the applicant's supporting affidavit and he cited the case of Philip Chemwolo & Another vs. Augustine Kubende [1986] eKLR in submitting that the lapse in filing the notice of appeal was purely clerical and unintentional and the same is curable under section 3B of the [Appellate Jurisdiction Act](#).
6. The applicant also submitted that the instant application was timely filed barely 50 days from the date of delivery of the judgement and therefore the mistake of counsel which caused the delay ought not be visited on the innocent litigant.



7. The respondents' counsel relied on the replying affidavit sworn by Jeremiah Onger Samba, Advocate on 9<sup>th</sup> January 2026 on their behalf and his undated written submissions in which he argues that the respondents are entitled to the fruits of a valid and regular judgment delivered after a full hearing. Therefore, granting an extension of time in the face of unexplained delay would unjustly deprive them of the benefit of that judgment, prolong litigation, and subject them to continued uncertainty and expense and given that the applicant has failed to demonstrate diligence or the existence of an arguable appeal.
8. I have considered the application, the affidavits on record and submissions by counsel and the law. The only question for determination is whether the applicant has met the threshold for the exercise of the Court's discretion to merit the orders sought. The Supreme Court of Kenya in *Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet* [2018] eKLR stated as follows:

“the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
9. Based on the cited decision, it is apparent that this application will be dispensed by determining whether the applicant has tendered sufficient reasons for not filing their notice of appeal and record of appeal within the stipulated time and whether the respondents will suffer any prejudice should the application be allowed. It is the applicant's case that the delay in filing the notice of appeal was because of an inadvertent mistake of failing to pay for the requisite fees after timely uploading the notice of appeal. It is also noteworthy that the instant application was timely filed on 5<sup>th</sup> November 2025 which is 37 days after lapse of the prescribed duration within which to file a notice of appeal.
10. In *Murai vs. Wainaina* (No. 4) [1982] KLR 33, Madan, J.A rendered himself as follows:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a person of experience who ought to have known better has made a mistake. The Court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates.”
11. Having considered the applicant's explanation, I'm persuaded that the delay in filing the notice of appeal within the prescribed time was as a result of a mistake as explained by the applicant. I have also looked at the eleven grounds in the draft memorandum of appeal and I am satisfied that the appeal is arguable. The respondents will not be prejudiced if this application is granted. I am persuaded that the applicant has sufficiently explained the reason for the delay. The length of delay is about 37 days. This period is not inordinate and the delay is excusable.
12. In the end, I find that the application is merited. Accordingly, I am inclined to exercise my discretion in favour of the applicant. Therefore, the application dated 5<sup>th</sup> November 2025 is allowed. The annexed notice of appeal dated 30<sup>th</sup> September 2025 is hereby deemed as properly filed and served. The applicant is directed to file and serve the record of appeal within 45 days of this ruling. Costs of this application shall abide the appeal.

**DATED AND DELIVERED AT ELDORET THIS 23<sup>RD</sup> DAY OF JANUARY, 2026.**

**J. MATIVO**



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**JUDGE OF APPEAL**

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

*Signed.*

Deputy Registrar.

