IN THE COURT OF APPEAL AT NAIROBI

(CORAM: KARANJA, MUCHELULE & KORIR, JJ.A.) CIVIL APPLICATION NO. NAI. E705 OF 2025 BETWEEN

MITSUMI COMPUTER GARAGE LTD.....APPLICANT

AND

FREIGHT IN TIME LTD ..... 1ST RESPONDENT TANDU ALARMS SYSTEMS LTD ..... 2ND RESPONDENT SECUREX AGENCIES (K) LTD .... 3RD RESPONDENT EVEREADY SECURITY GUARDS Co. LTD ..... 4TH RESPONDENT GA INSURANCE LTD ..... 5TH RESPONDENT

(Being an application under Rule 86 seeking to strike out the Notice of Appeal dated 24th September 2025 arising from the ruling of the High Court of Kenya at Nairobi (F. Gikonyo, J.) dated 18th September 2025

in

Milimani HC COMM No. 367 of 2016)

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(As heard together with)

CIVIL APPLICATION NO. NAI. E585 OF 2025

BETWEEN

FREIGHT IN TIME LTD.....APPLICANT

AND

MITSUMI COMPUTER GARAGE LTD.....RESPONDENT

(Being an application for stay of proceedings pending the hearing and determination of an intended appeal arising from the ruling of the High Court of Kenya at Nairobi (F. Gikonyo, J.) dated 18th September 2025

in

Milimani HC COMM No. 367 of 2016)

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REASONS FOR THE DECISION DATED 17TH DECEMBER 2025

1. On 17th December 2025, we heard two applications. In Civil Application No. E585 of 2025, the applicant (Freight In Time Ltd), through the Notice of Motion dated 9th October 2025 and amended on 5th November 2025, sought to stay proceedings in HC. COMM Case No. 367/2016 pending the hearing and determination of its intended appeal against the ruling delivered by F. Gikonyo, J. on 18th September 2025. Mitsumi Computer Garage Ltd, Tandu Alarms Systems Ltd, Securex Agencies (K) Ltd, Eveready Security Guards Co. Ltd, and GA Insurance Ltd were named as the respective 1st to 5th respondents. The second application (Civil Application No. E705 of 2025) which was filed by Mitsumi Computer Garage Ltd, named Freight In Time Ltd, Tandu Alarms Systems Ltd, Securex Agencies (K) Ltd, Eveready Security Guards Co. Ltd and GA Insurance Ltd as the respective 1st to 5th respondents and sought to strike out the Notice of Appeal dated 24th September 2025 anchoring Freight In Time Ltd's application in Civil Application No. E585 of 2025.

2. At the hearing, learned counsel, Mr. Wachira, appeared for Freight In Time Ltd, whereas learned counsel, Mr. Ndegwa, was present for Mitsumi Computer Garage Ltd. Also present were learned counsel, Mr. Lando, for Tandu Alarms Systems Ltd, and learned counsel, Mr. Kiplagat, for GA Insurance Ltd. There was no appearance for Securex Agencies (K) Ltd and Eveready Security Guards Co. Ltd despite their being served with the hearing notice.

3. After hearing the applications and pursuant to rule 34(1) and (7) of the Court of Appeal Rules, 2022, we gave our decision allowing Civil Application No. E705 of 2025, thus striking out the Notice of Appeal dated 24th September 2025 and Civil Application No. E585 of 2025. We also awarded costs to the respondents in attendance in the allowed application. We now give the reasons for our decision.

4. Considering the nature of the orders sought in the two applications, we started by considering Civil Application No. E705 of 2025, through which Mitsumi Computer Garage Ltd (***"the applicant"***), pursuant to the notice of motion dated 24th November 2025, sought orders as follows:

> ***"i. Spent.***
>
> ***ii. THAT this Honourable Court be pleased to strike out the Notice of Appeal dated 24th September 2025 by the 1st Respondent against the ruling and orders of the High Court Milimani delivered on 18th September 2025 in HC.COMM 367 OF 2016.***
>
> ***iii. THAT in the alternative and without prejudice to the foregoing, the Notice of Appeal dated 24th September 2025 by the 1st Respondent be deemed as withdrawn.***
>
> ***iv. THAT as a consequence of 2, and 3 above, the 1st Respondent's Civil Application No. E-585 of 2025: Freight in Time Limited v Mitsumi Computer Garage Ltd & 4 Others dated 5th November 2025 and brought under Rule 5(2)(b) be declared incompetent and struck out, the Court being divested of jurisdiction absent a valid Notice of Appeal.***
>
> ***iv. The costs of these Applications be borne by the 1st Respondent."***

5. The application was supported by the grounds on its face and an affidavit sworn by **Consolata Kiura**, who introduced herself as the Legal Manager of Mayfair Insurance Company Limited, the insurer of the applicant. In brief, the applicant's case was that although the impugned Notice of Appeal dated 24th September 2025 was lodged within the prescribed time, the 1st respondent failed to comply with rule 79(1) of the Court of Appeal Rules, 2022, as the notice of appeal was served on the applicant on 1st November 2025, long after the mandatory period of seven days had expired; and that the Notice of Appeal was also not served upon the 2nd to 5th respondents within the required seven days after its lodgment, notwithstanding that they were *"persons directly affected"* by the 1st respondent's intended appeal and application for stay of proceedings. It was, therefore, the applicant's summation that non-compliance with rule 84(1) as read with rules 84(2) and 79(1) of the Court's Rules rendered the Notice of Appeal incurably defective, invalid in law, and incapable of sustaining an appeal.

6. In response to the application, Vinesh Shah, the 1st respondent's director, swore an affidavit on 3rd December 2025. While admitting that the Notice of Appeal, though lodged timeously, was served upon the applicant and the 2nd to 5th respondents outside the seven days prescribed under **rule 79(1)** of the **Court of Appeal Rules**, it was averred that the delay was not deliberate but arose from an inadvertent oversight by counsel who had nevertheless promptly rectified the mistake. Shah deposed that the Court had wide discretion under **rule 4** of its

Rules to extend time for doing

any act authorised or required by the Rules, including service of documents, and that the discretion should be exercised in its favour. According to the deponent, the discretion granted to the Court by rule 4 of its Rules is meant to promote substantive justice and prevent technicalities from defeating the ends of justice, and in this case, striking out the Notice of Appeal would unduly prejudice the 1st respondent by denying it the opportunity to have the appeal heard on its merits.

7. Through submissions dated 16th December 2025 filed in support of the application, it was argued that service of the notice of appeal within the time provided in **rule 79(1)** is the foundational act by which this Court's appellate oversight is invoked and that where service is not done within the mandatory timeline prescribed therein, the jurisdictional defect is not cured by the fact that the notice of appeal was filed within time. To buttress this point, counsel referred to **Chepyegon vs. Chepyegon [2023] KECA 798 (KLR)**, where the Court struck out a notice of appeal that had been filed timeously but served 52 days after filing, finding it incompetent. Counsel also referred to **Mbarak vs. Registrar of Titles & 3 Others; Omido & Another (Interested Parties) [2024] KECA 687 (KLR)**, where the Court rejected explanations grounded on convenience, cost, or logistical difficulty, and emphasised that compliance with **rule 79** is mandatory and not optional. Urging us to strike out the notice of appeal, counsel further submitted that the notice on record was incapable of invoking the jurisdiction of this Court, including the interlocutory jurisdiction

under **rule**

5(2)(b), which presupposes the existence of a valid and competent notice of appeal. Attacking the letter bespeaking proceedings, counsel referred to **Justus Aloo Ogeka & 6 Others vs. Kenya Union of Commercial Food and Allied Workers & 2 Others [2018] KECA 872 (KLR)** to urge that where the request for proceedings is not served within the prescribed period, an appellant must file the record of appeal within sixty days. It was also counsel's submission that the 1st respondent had not properly invoked **rule 4** as read with **rule 55** of the Court of Appeal Rules, hence the Court could not exercise its discretionary powers to enlarge the time for serving the notice of appeal. In support of this assertion, counsel referred to **Mae Properties Limited vs. Joseph Kibe & Another [2017] KECA 238 (KLR),** where the Court explained that an order extending time is made by a single Judge upon the filing of an application. Learned counsel, therefore, asked that we strike out the Notice of Appeal and Civil Application No. E585 of 2025 with costs.

8. In opposition to the application, learned counsel for the 1st respondent, invoked **rule 4** of the **Court of Appeal Rules** to urge that the Court ought to exercise its unfettered discretion to enlarge time. He relied on **Leo Sila Mutiso vs. Helen Wangari Mwangi [1999] 2 EA 231** to highlight the principles for enlargement of time and **Towett vs. Kibaru & Another [2025] KECA 1650 (KLR)** to argue that the mistake of counsel should not be visited upon an innocent litigant. Counsel maintained that the delay in service was short, satisfactorily

explained, the appeal arguable and substantial

justice demanded that the notice of appeal be preserved as no prejudice would be occasioned to the applicant. Counsel consequently prayed for enlargement of time and the deeming of the Notice of Appeal as duly filed.

9. Learned counsel, Mr. Lando, was not opposed to the application, whereas Mr. Kiplagat indicated that he had nothing to say and would wait for the Court's decision.

10. Upon addressing our minds to the application, the replying affidavit, and the submissions by counsel, the only issue we identified for determination was whether there was a valid notice of appeal on record. Before we proceed to consider the merits of the application, we confirmed from the record that the application in question was filed on 24th November 2025 and the impugned Notice of Appeal having been served on the applicant on 1st November 2025, the application had complied with **rule 85(1)** of the **Court of Appeal Rules** which requires an application for striking out a defective notice of appeal to be brought within thirty days from the date of service.

11. Turning to the merits of the application, we note that the 1st respondent in its replying affidavit readily conceded that its Notice of Appeal, though filed within the prescribed period, was not served on the applicant and the 2nd to 5th respondents within the seven days stipulated in **rule 79(1)** of the **Court's Rules**. In further acknowledgement of its non-compliance with the rules, the

1st respondent sought, in its replying affidavit, to invoke the Court's discretionary power under **rule 4** to enlarge time.

12. The Court in **Kaduda vs. Douglas [1981] KECA 32 (KLR)**, when faced with a question regarding service of a record of appeal, struck out the appeal, holding that:

> **"The responsibility for effecting service is in each case placed upon the appellant by the relevant Rule. Mr Chalalu for the appellant has taken no steps before today to apply for extensions of time and so regularise these procedural defects."**

13. An appellant must comply with the timelines provided in the Rules of the Court lest the documents filed out of time are rendered incompetent and fall prey to being struck out. The 1st respondent herein failed to comply with the rules by not serving the applicant and other affected parties with the notice of appeal within the prescribed period. It then follows that the 1st respondent doesn't have a competent notice of appeal.

14. Furthermore, we note that the 1st respondent, in an attempt to explain the non-service, has laid blame at the doorstep of the advocate. The Court in **Martin Kabaya vs. David Mungania Kiambi [2015] eKLR** underscored the need to comply with the rules and to achieve timeous adjudication of disputes thus:

> **"The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a**

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perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by plaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the Judiciary bears as backlog."

15. Restating the important place of the rules when invoking the Court's jurisdiction, the Court in **Kali Security Co. Ltd vs. Patrick Mureithi [2005] KECA 300 (KLR)** held that:

> **"The jurisdiction of this Court is conferred by statute and is precipitated by the filing of a notice of appeal. The notice of appeal is the launching pad, as it were and time does not begin to run until the notice of appeal is lodged. Such notice may in civil matters filed in strict compliance with Rule 74 or on such extended date as the court may order upon application for extension of time under rule 4."**

16. And in **Patrick Kiruja Kithinji vs. Victor Mugira Marete [2015] eKLR**, the Court reiterated the need to have a properly lodged notice of appeal and the place of a notice of appeal in invoking the jurisdiction of the Court, and held that:

> **"In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under *Article 159.*"**

17. From the foregoing authorities, it is clear that without a properly filed notice of appeal, the 1st respondent could not rely on **Article 159** of the **Constitution** to circumvent clear rules of the Court. It is also evident that without a proper application for enlargement of time, the applicant cannot seek enlargement of time through a replying affidavit. The Rules of the Court are clear that an application under **rule 4** should first be heard and determined by a single Judge, and where enlargement of time is declined, the matter may be escalated for consideration by a full bench. The 1st respondent, having conceded to the misstep in regularising the notice of appeal, had the alternative of retreating to the procedural framework put in place in the Rules of the Court in order to regain a steady footing before the Court. He did not do so. Rules are put in place not to encumber justice but to level the playing ground. They should not be seen as an unnecessary burden but as harbingers of justice. A party ignores rules at their own peril.

18. We think we have said enough to demonstrate why we struck out the 1st respondent's Notice of Appeal dated 24th September 2025.

19. Regarding Freight In Time Ltd's Civil Application No. E585 of 2025, we need not say much save to point out that under **rule 5(2)(b)** of the **Court of Appeal Rules, 2022**, the Court is only seized of jurisdiction once a notice of appeal is filed. Thus, in **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others [2010] KECA 346 (KLR)** the Court held that:

“It has been said time without number that in an application under Rule 5(2)(b) what gives the Court the

jurisdiction to hear and determine the motion is the filing of the notice of appeal."

20. The Supreme Court emphasized the importance of the notice of appeal in **Sawe vs. Independent Electoral & Boundaries Commission (IEBC) & 4 Others [2015] KESC 7 (KLR)** thus:

> **"What is the objective purpose of the Notice of Appeal? It serves the important role of informing the relevant parties to the suit, especially the successful litigants, that their gains may be cut short, or delayed. It signals the intention to pursue an appeal. It is only fair that the parties, in the light of their legitimate anticipation, should know within the shortest time possible, whether to rest their litigious poise. It is consistent with the general rule guiding the judicial process: "litigation must come to an end"."**

21. In the circumstances, having allowed Mitsumi Computer Garage Ltd's application for striking out Freight In Time Ltd's Notice of Appeal, it followed that its application for stay of proceedings under **rule 5(2)(b)** had no foundation upon which to stand. That explains why Civil Application No. E585 of 2025 that was seeking stay of the proceedings in the High Court, was struck out.

22. The final issue relates to the costs of the two applications. Sometimes it is important that the Court explain the reasons for awarding costs in circumstances that require empathy, like in the case of Freight In Time Ltd. At the hearing of the applications, we pointed out to Mr. Wachira, learned counsel for Freight In Time Ltd, why we were likely to make the decision that we eventually made on that day. The reasons were easily discernible from Mitsumi Computer Garage Ltd's application

and the submissions

in support thereof. However, learned counsel opted to soldier on and requested a reasoned ruling despite being urged to pursue alternative means to resuscitate his client's application. Having put the other parties through an unnecessary hearing, we had no option but to comply with the general rule that costs follow the event. That then explains the award of costs to Mitsumi Computer Garage Ltd, Tandu Alarms Systems Ltd, and GA Insurance Ltd in respect of Civil Application No. E705 of 2025.

23. These then are the reasons for the decision we made on 17th December 2025.

Dated and delivered at Nairobi this 13th day of February 2026.

W. KARANJA

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.