



**Sunday Publishers Limited v Kenya National Highways Authority (Miscellaneous Application E651 of 2024) [2026] KEHC 2431 (KLR) (Civ) (2 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 2431 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS APPLICATION E651 OF 2024**

**AC MRIMA, J**

**MARCH 2, 2026**

**BETWEEN**

**SUNDAY PUBLISHERS LIMITED ..... APPLICANT**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... RESPONDENT**

**RULING**

**Background:**

1. The genesis of this dispute lies in Nairobi [Milimani] Chief Magistrate's Court Commercial Civil Suit No. 8702 of 2018 (hereinafter referred to as 'the suit'), where Sunday Publishers Limited, the Applicant herein, sued Kenya National Highways Authority, the Respondent herein, for the recovery of Kshs. 18,000,000.00 allegedly owed for advertising services rendered.
2. In its judgment delivered on 16<sup>th</sup> April 2021, the trial Court dismissed the Applicant's suit with costs upon finding that the Respondent could not be held liable for the claim. Aggrieved by the dismissal, the Applicant sought to appeal but failed to file the necessary documents within the statutory timelines. Consequently, the Applicant filed High Court Miscellaneous Application No. E290 of 2021, seeking leave to appeal out of time.
3. By a Ruling delivered on 17<sup>th</sup> June 2022, the Court allowed the application and granted the Applicant leave to appeal out of time. The Court directed the Applicant to file and serve a Memorandum of Appeal together with the Record of Appeal within 60 days from the date of the Ruling.
4. The sixty-day period lapsed on or about 16<sup>th</sup> August 2022. The Record of Appeal was eventually filed in this Court on 29<sup>th</sup> May 2024, nearly two years after the deadline. The Applicant has now approached this Court seeking to validate this late filing.



### **The Application:**

5. Through the Notice of Motion dated 3<sup>rd</sup> March 2025, brought under Sections 1A, 1B, 3, 3A, and 95 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, the applicant seeks the following orders:
  1. That the Applicant/Appellant's Record of Appeal dated 21<sup>st</sup> September, 2022 and filed on 29<sup>th</sup> May, 2024 be deemed as duly filed.
  2. That the costs of this Appeal be in the cause.
6. The application is supported by the Affidavit of Hilda Andeso Obiri, sworn on 3<sup>rd</sup> March 2025. She deposed that Applicant complied with the directions of 17<sup>th</sup> June 2022 by preparing the Record of Appeal in time. However, a newly employed clerk inadvertently filed the Appeal in the Court of Appeal (Case No. E650 of 2022) instead of the High Court. It was her case that the Applicant made efforts to transfer the suit from the Court of Appeal to the High Court but was unsuccessful and was advised by the registry to file a fresh appeal in the High Court.
7. The Applicant contended that the delay was occasioned by the inadvertent error and not by malice, and that the appeal raises reasonable grounds with high chances of success.
8. The Applicant sought refuge in Article 159 of the Constitution, to urge the Court to administer substantive justice and not penalize the litigant for counsel's mistake.

### **The Submissions**

9. The Applicant filed written submissions dated 6<sup>th</sup> October 2025. It reiterated that the delay was not intentional or meant to spite the Respondent but was a result of an unforeseen delay and the inadvertent filing in the wrong Court. On the principles for extension of time, the Applicant relied on the discretionary powers of the Court and referred to the decision in Joseph Kinyua and 2 others -vs- Robert Kimathi Maiti [Civil Application No. 114 of 2018] where it was observed that the Court should be guided by principles to achieve a just decision.
10. The Applicant further relied on the renowned case of Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi [1999] 2EA 331, in submitting that the Court must consider: the length of the delay, the reason for the delay, the chances of the appeal succeeding, and the degree of prejudice to the respondent. Regarding the reason for delay, the Applicant argued that it has tabled evidence of the erroneous filing in the Court of Appeal and its attempts to rectify the situation. It submitted that the conduct of the Applicant was justifiable and unpretentious. On the chances of success, the Applicant argued it has an arguable case based on the contractual relationship and the Principal-Agent relationship between the Respondent and the General Advertisement Agency (GAA). It argued that the trial Court placed an overly high burden on them regarding the internal payment mechanisms between the Respondent and GAA.
11. Finally, in invoking the overriding objective under Section 1A of the Civil Procedure Act, the Applicant urged the Court to balance the right of appeal against the Respondent's right to enjoy the judgment, asserting that the delay was far from a craft ploy.

### **The Respondent's case:**

12. Kenya National Highways Authority opposed the application through a Replying Affidavit of Richard Kimutai Kilel, the Assistant Director, Supply Chain Management, deposed to on 20<sup>th</sup> May 2025. It



was his case that the 60-day period granted by the Court on 17<sup>th</sup> June 2022 lapsed on 16<sup>th</sup> August 2022. He asserted that the Applicant failed to comply with the foregoing order and effectively abandoned the matter for nearly two years before filing the instant appeal in May 2024.

13. The Respondent challenged the Applicant's explanation regarding the erroneous filing, noting that it failed to provide documentary evidence of when the documents were filed in the Court of Appeal. He pointed out that even by the Applicant's own account, the alleged filing was on 26<sup>th</sup> September 2022, was already outside the 60-day deadline. It was his case that the Applicant admitted in correspondence dated 21<sup>st</sup> January 2023 that their decision not to proceed with the appeal was influenced by a nominal expense of Kes. 6,000.00, implying a conscious decision to abandon the appeal rather than a mere procedural error.
14. The Respondent contended that the delay of nearly two years is inordinate and prejudicial, as it keeps the Respondent, a public body, in a state of legal and administrative uncertainty.

### **The Submissions**

15. In its written submissions dated 6<sup>th</sup> October 2025, the Respondent described the Applicant's conduct as profound indolence and neglect. The Respondent drew support from the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, to front the position that extension of time is not a right but an equitable remedy available only to deserving parties who explain the delay to the satisfaction of the court.
16. On the issue of delay, the Respondent submitted that the Applicant sat on its rights for almost two years after the deadline. It made reference to the case of *Joseph Muiruri Minja -vs- Delmonte Kenya Ltd* [2018] KECA 522, where it was observed that the law does not recognize lethargy or lack of funds as sufficient cause for non-compliance. The Respondent emphasized that equity aids the vigilant. To that end, it cited the case of *Njoroge -vs- Kimani* [2022] KECA to argue that the Applicant's admission regarding the nominal expense proved that the abandonment was voluntary.
17. Finally, the Respondent submitted that granting the orders would erode the principle of finality in litigation, a position reaffirmed by the case of *Mohamed -vs- Diamond Trust Bank Kenya Ltd* [2025] KESC.

### **Issues for Determination**

18. Having considered the application, the parties' submissions and the decisions referred to, the following are the issues for determination in this matter: -
  - i. Whether the Applicant has demonstrated sufficient cause to warrant the exercise of this Court's discretion to deem the Record of Appeal filed out of time as duly filed.
  - ii. Whether the Respondent will suffer prejudice if the orders sought are granted.

### **Analysis and Determination:**

19. The Court will now consider the above issues in seriatim.

#### **(a) Whether the Applicant has demonstrated sufficient cause to warrant the exercise of this Court's discretion to deem the Record of Appeal filed out of time as duly filed:**

20. The jurisdiction of this Court to extend time is discretionary. As correctly submitted by both parties, such discretion must be exercised judicially and not whimsically. The guiding principles were settled in *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi* [1999] 2EA 331 and affirmed by the Supreme



Court in Nicholas Kiptoo Arap Korir Salat -vs- IEBC & 7 Others [2014] eKLR where it was observed thus: -

... Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.

21. The factors Courts take into account as crystalized by the Court in the Leo Sila Mutiso case [supra] include, the length of delay, the reason for the delay, the chances of the appeal succeeding, and the prejudice to the respondent.
22. I will now apply the above principles in this matter. On the length of delay, the ruling granting leave to appeal was delivered on 17<sup>th</sup> June 2022, with a strict directive to file the Record of Appeal within 60 days. The deadline for filing was, therefore, 16<sup>th</sup> August 2022. The Record of Appeal sought to be deemed as duly filed was lodged on 29<sup>th</sup> May 2024. It constitutes a delay of approximately one year and nine months beyond the stipulated deadline. A delay of nearly two years is inordinate and requires a compelling explanation. The Applicant attributes the delay to an inadvertent error by a newly employed Clerk who filed the appeal in the Court of Appeal instead of the High Court. While mistakes of Counsel (or their Clerks) should not necessarily be visited upon the litigant, this principle is not absolute. It acts as a shield only where there is evidence of diligence. I have keenly perused the annexure marked HAO 1, in the Applicant's supporting affidavit. It shows that even the erroneous filing in the Court of Appeal occurred on 26<sup>th</sup> September 2022 which represents a delay of more than a month after the 60-day deadline of 16<sup>th</sup> August 2022 had already lapsed. Therefore, the Applicant was already in default before the alleged 'mistake' occurred. The inadvertent filing explains the period after September 2022, but it fails to explain why the deadline of August 2022 was missed in the first place.
23. More important for this Court is the gaping period of unexplained inactivity between 21<sup>st</sup> January 2023, when the Applicant wrote to the Respondent about the error, and May 2024, when the record was filed. The Applicant has not provided a satisfactory explanation for the dormancy of over 16 months. In the assessment of this Court, it suggests a lack of diligence and a degree of deliberate abandonment.
24. On the chances of success, the Applicant argued that it has an arguable appeal concerning the liability of the Respondent vis-à-vis the Government Advertising Agency. While the appeal is not necessarily frivolous, the existence of an arguable case is not a standalone ground for extending time.

**b) Whether the Respondent will suffer prejudice if the orders sought are granted:**

25. The judgment in the trial Court was delivered in April 2021. The Respondent has been waiting for finality for over four years. To reopen the window of appeal nearly two years, based on the Applicant's profound lethargy, would undoubtedly prejudice the Respondent's right to closure and finality. In the case of Nick Salat -vs- Independent Electoral and Boundaries Commission & 7 others case [supra], the learned Judges of the Apex Court approvingly made reference to the decision of the Supreme Court of California in the case of Silverbrand -vs- County of Los Angeles [2009] 46 Cal. 4<sup>th</sup> 106 where the need for finality was discussed thus;

... Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.



(Sic) The purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all.

26. Consequently, this Court finds that the Applicant has failed to demonstrate sufficient cause for the inordinate delay. The explanation proffered is unsatisfactory and does not account for the entire period of delay, nor does it excuse the initial failure to meet the 60-day deadline set by this Court.

**Disposition:**

27. The upshot is that the application lacks merit and the following final Orders hereby issue: -

- (a) The Notice of Motion dated 3<sup>rd</sup> March 2025 is hereby dismissed.
- (b) The Applicant shall bear the costs of this application.
- (c) This file is hereby marked as Closed.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MARCH, 2026.**

**A. C. MRIMA**

**JUDGE**

Ruling- virtually delivered in the presence of

Miss Ochola, Learned Counsel for the Appellant/Applicant.

Miss Kinyua, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.

