



FHJA (Suing as mother and next friend of the minor) v ASAB (Civil Application E661 of 2025) [2026] KECA 484 (KLR) (6 March 2026) (Ruling)

Neutral citation: [2026] KECA 484 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E661 OF 2025**

**JO OKELLO, JA
MARCH 6, 2026**

BETWEEN

FHJA (SUING AS MOTHER AND NEXT FRIEND OF THE MINOR) APPLICANT

AND

ASAB RESPONDENT

(An application for extension of time to file an appeal out of time against the ruling and order of the High Court at Nairobi (C. Kendagor, J.) delivered on 6th October, 2025 in Civil Appeal No. E095 of 2025)

RULING

1. By a Notice of Motion dated 6th November, 2025, the applicant, applied for leave to file the Notice and Memorandum of Appeal out of time against the Ruling delivered on 6th October, 2025 in Nairobi High Court Family Division Civil Appeal No. E095 of 2025.
2. The matter came up for hearing by way of written submissions on 26th February, 2026. The firm of Wangila & Wangila Advocates is on record for the Applicant while Messers Ali & Co. Advocates is on record for the Respondent. The Notice of Hearing was duly served.
3. The Applicant’s case is premised on the grounds stated on the face of the application and the supporting affidavit of the applicant herein. The Respondent has also filed a replying affidavit opposing the application.
4. In the application and the supporting affidavit therein, the applicant avers that the intended appeal raises substantive points of law, including misapplication of the best interests of the child, the procedural irregularity of an unrecorded voire dire examination and the failure to give due weight to the minor’s wishes as a child of tender years. The applicant attributes the delay in filing the notice of appeal and memorandum of appeal on time as inadvertent mistake of the previous Counsel, and now



she instructed a new counsel to act for her in the matter. The applicant deposed that she was dissatisfied with the ruling delivered on 6th October, 2025 which dismissed her application for stay of execution of the lower court's order.

5. She further deposed that in execution of the lower court's judgment, the Respondent forcibly assumed custody of the minor and that the minor was traumatically removed from her care, her home and her familiar environment. That the minor is a girl of tender years, is in a state of extreme emotional distress and trauma due to the forced separation from the mother, which constitutes substantial and irreparable harm that cannot be compensated. The applicant further deposed that the appeal is arguable.
6. The application is opposed by the respondent via a replying affidavit dated 24th February, 2026, on grounds that the application is an abuse of the court process as the orders sought for extension of time herein are verbatim, similar and duplicate to those sought in the application dated 6th November, 2025 in Civil Appeal No. E690 of 2025, Fedhela Hassan Jumaan Awadh vs Ahmed Salim Abubakar Bajaber.
7. He further deposed that the present application was filed twenty- five days out of statutory timeline for which the period of delay has not been explained.
8. Rule 4 of the Court of Appeal Rules provides:

“The Court may, on such terms as it thinks just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

9. As stated, time and again, Rule 4 of this Court's Rules gives a single judge an unfettered discretion and so long as the discretion is exercised judicially, a Judge would be entitled to consider any other factor outside those listed so long as the factor is relevant to the issue since the principles enunciated before are not exhaustive.
10. The principles that guide this Court in determining whether to extend time pursuant to Rule 4 of the Rules of this Court are now well settled. In *Mwangi vs Kenya Airways* (2003) KLR 486 at page 489 the Court stated as follows:

“Over the years, the Court has set out guidelines on what a single judge should consider when dealing with an application for extension of time under Rule 4. For instance, in *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi*, (Civil Application No. Nai. 255 of 1997, the Court expressed itself thus: It is now well settled that the decision whether to extend the time is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are; first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”

11. The principles enunciated are the principles I proceed to apply in the instant case in determining whether the prayers sought by the applicants in their Notice of Motion dated 6th November, 2025 should be granted. The applicants' prayers are that the Honourable Court extend time and grant leave to allow the applicants file notice of appeal and the Memorandum of Appeal out of time against the ruling dated 6th October, 2025 in Nairobi NAI No. E661 of 2025, and that the notice of appeal dated 6th November, 2025 be deemed as duly filed and further that the applicant be allowed to file the



memorandum of appeal out of time. The applicants further pray that the cost of this application be in the cause.

12. The Respondent in opposing the application have deposed that the applicant has not tendered a plausible and reasonable explanation for the delay; the application is sub-judice and therefor an abuse of the court process; that the applicant had already filed an application for review on the same orders and therefore this application is frivolous and vexatious and that a similar matter is still pending in the High Court and that the appeal pending hearing in the High Court came up for mention on 25th February, 2026 to confirm compliance with directions and to get a date for judgment.
13. Having considered the application, the supporting affidavits, the responses, the submissions and the authorities cited and the law, this Court is now called upon to determine whether the application meets the threshold for enlargement of time.
14. The first issue of consideration is the length of delay. From the records, the ruling in issue was delivered on 6th October, 2025, where upon the applicant had 14 days within which to file the notice of appeal i.e., 20th October, 2025. The applicant filed the notice of appeal on 6th November, 2025, 16 days outside the statutory timeline. The applicant submits that the delay in filing the appeal is minimal. The length of delay is considered on a case-by-case basis. In *Muya vs Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya (Petition 4 of 2020) [2022] KESC 37 (KLR)* was held that “where there is delay, the Court must interrogate whether the same is justifiable and thus excusable, or not. In order to do that, the Court must interrogate the circumstances of the case.”
15. Noting that the notice of appeal ought to have been filed on or before 20th October, 2025 and that the application for leave to file appeal out of time has been filed 16 days after the said date, and further that no satisfactory explanation and justification has been given, I find that the delay is inordinate and undeserving of this Court’s discretion to extend the time. The applicant may however take solace in the fact that there is a pending appeal in the High Court on the same matter and depending on how that goes, she may have a second bite of the cherry by proffering an appeal to this Court.
16. On the reason for delay, the applicant, deposed in her supporting affidavit sworn and filed on 6th November, 2025 that the delay in filing the notice and record of appeal was attributed to the mistake of her previous advocates Ashioya & Co. Advocates who did not lodge the notice of appeal and was therefore not able to compile the record of appeal. That upon realizing the failure of her advocates on record to act as instructed, she instructed the firm of Wangila and Wangila Advocates who proceeded to file this application. Thus, it is the applicant’s case that the delay which is approximately one month is entirely attributable to her previous counsel. The applicant further submits that the delay in filing the appeal is minimal, occasioned by counsel, and that the delay has been sufficiently explained. A litigant, she states, should not be penalized for the mistakes of their advocate.
17. I however note that no evidence has been placed to substantiate these averments. In fact, the converse is true that the said advocate is still on record for the applicant in a related matter pending in the High Court. Further, the applicant has not demonstrated any efforts made through correspondence to follow up on their advocates whom they aver were not responsive and yet they are still on record in a similar matter in the High Court.
18. In *Gaciani & 11 Others vs Kimanya & Another (Application E004 of 2023) [2023] KESC 23 (KLR)* the Supreme Court stated;

“Whereas mistakes of an advocate ought not to be visited upon a litigant, there must be cogent and credible evidence, the applicants have not demonstrated any efforts or due



diligence, through evidence or correspondence of the follow up with the advocates or to pursue their rights as we found in *George Kangéthe Warihui vs. Esther Nyamweru Munene & Another* (Civil Application No 18 of 2020 [2021] eKLR. It is not enough for a party to simply blame the advocates on record for all manner of transgressions. Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not.”

19. The jurisdictional importance of filing an appeal within the prescribed timelines was succinctly stated in *Nick Salat vs Independent Electoral and Boundaries Commission & 7 Others* (Application 16 of 2014) (2014) KESC 12 (KLR); the Supreme court remarked;

“Time is a crucial component in dispensation of justice, hence the maxim: justice delayed is justice denied. It is a litigants’ legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined.”

20. On whether there are chances of success, I have to consider whether there is a single arguable ground that has been raised by the applicant. She also submits that the intended appeal is arguable and raises substantive points of law. Having carefully considered the grounds set out in the motion and in my view, the appeal is arguable. An arguable point is not necessarily one that must succeed, but merely one that is deserving of consideration by the Court.

21. Finally, on the degree of prejudice, the applicant submitted that the respondent will suffer no prejudice that cannot be compensated by costs, whereas as the applicant and the minor, they will suffer if time is not extended and the appeal rendered nugatory. From the Applicant’s submission, it is clear that the Respondent, following the court ruling of 6th October, 2025, has taken physical custody of the minor. The Respondent on the other hand submitted that this application is frivolous and vexatious because there is a pending appeal in the High Court awaiting judgment.

22. The upshot of this is that the applicant has not persuaded this Court that her application is deserving. Considering that the minor is already in the custody of the Respondent and there is a pending judgment in the High Court, I would rather maintain the status quo. Let the appeal in the High Court run its course after which, the Applicant may approach this Court if dissatisfied with the outcome of the appeal in the High Court. This Court, therefore, finds no merit in the Notice of Motion dated 10th November, 2025.

23. Consequently, for the reasons stated, I make the following orders:

- i. The Notice of Motion dated 10th November, 2025 is dismissed;
- ii. Each party shall bear their own costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MARCH, 2026.

(DR.) J. O. OKELLO

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JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

