

**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: OKELLO, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI E665 OF

2025 BETWEEN

AMIT JAYANT JETHWA.....APPLICANT

AND

DIPASH LAXMIDAS LUHAR.....RESPONDENT

(An application for leave to file and serve Notice of Appeal and Memorandum of Appeal out of time against the Judgement of the High Court in Nairobi (J. M. Omido, J.) delivered on 24th September, 2024

in

Civil Appeal No. E537 of 2023)

R U L I N G

1. By a Notice of Motion dated 9th October, 2025, the applicant applied for extension of time to file and serve the Notice and Memorandum of Appeal out of time against the judgement delivered on 24th September, 2024 Nairobi High Court Civil Appeal No. E537 of 2023.
2. The Applicant's case is premised on the grounds stated on the face of the application and his supporting affidavit where

among

other things, the Applicant avers that the extension of time be granted on grounds that: —

- (a) the delay in filing the intended appeal was not deliberate but occasioned by the Applicant's inability to raise funds for security for costs and judgement sum as demanded by his previous advocates before lodging the appeal;*
- (b) that his financial position was aggravated by his resignation from employment;*
- (c) that the applicant has also been battling health challenges which further constrained his ability to instruct counsel and pursue the appeal promptly;*
- (d) that the intended appeal raises serious and arguable issues of law and fact with high chances of success; and*
- (e) that no prejudice will be occasioned to the Respondent if the orders sought are granted, and it is in the interest of justice that the Applicant be allowed to ventilate his appeal on the merits.*

9. The firm of Kamwara Law & Co. Advocates is on record for the Applicant while the firm of Kamau Chege & Kagunyi Advocates is on record for the Respondent. The Hearing Notice was duly served via email on 13th February, 2025 where the Applicant and the Respondent were reminded to comply with the directions issued in regard to service and filing of written submissions before the hearing date.

10. This application is governed by **Rule 4** of the Court of Appeal Rules which provides that:

“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 authorised 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.”

11. The parties did not comply with directions as required.

Accordingly, written submissions were not filed. The Respondent however acknowledged receipt of the hearing notice vide letter dated 25th February, 2026 addressed to the Registrar noting that they were unable to file responses and the submissions to the application because they had not been served with the said application. The Applicant on the other hand has not acknowledged the receipt of the Hearing Notice.

12. Hearing of this application is by way of written submissions.

Thus, the Applicant did not appear for the hearing on account of failure to comply with directions and thus failing to file his written submissions. The respondent could not file

submissions

or file their responses because they were not served with the application.

13. Extension of time is an equitable remedy and not a right. It is therefore discretionary in nature. The court in considering the application therefor is guided by the following factors which are well settled in our jurisprudence; the length of delay, reasons for delay, prejudice to the respondent and merits of the intended appeal. The Supreme Court in **Nicholas Kiptoo**

Arap Korir Salat

vs Independent Electoral and Boundaries Commission & 7

Others [2014] eKLR summed up the applicable considerations

as follows:

- (a) *extension of time is not right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
- (b) *a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;*
- (c) *whether the court should exercise the discretion to extend time, is a consideration to be made on a case- to-case basis;*
- (d) *whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction*

of the Court;

- (e) whether there will be any prejudice suffered by the respondents if the extension is granted;*

- (f) *whether the application has been brought without undue delay; and*
- (g) *whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

14. Since the Applicant did not file his submissions nor comply with directions, I invoke the provisions of **Rule 58(1)** of Court of Appeal Rules on “procedure for non-appearance”.

Rule 58(1) provides: -

“If, on any day fixed for hearing of an application, the applicant does not appear or comply with directions, the application may be dismissed, unless the Court sees fit to adjourn the hearing:

Provided that the Court may order that an application may be heard by way of written submissions and where parties have filed written submissions, the court shall consider the submissions.”

15. The Applicant did not appear and also failed to comply with the directions. Further, the Applicant did not acknowledge the receipt of the hearing notice despite being served. The Respondent advocates did acknowledge receipt of the hearing notice and averred that they were not served with the application

and thus their inability to file responses and written submissions.

16. Noting that this application is being brought one year later after the judgement was delivered and the hearing notice properly served, I expected the Applicant and his counsel to be more vigilant and at least take some steps to have the application prosecuted expeditiously. For failing to comply with the directions and not acknowledging receipt of the Hearing Notice, it leaves the Court with very little option but to conclude that the Applicant may not have been ready or interested in proceeding with the matter. I'm left to play a guessing game as to what may have happened. It must also not be lost that this is a second appeal.

17. The delay in itself is inordinate and the Applicant did not give the court a chance to consider the merit or otherwise of his application. Note the inordinate delay; the application seeking for extension of time is dated **9th October, 2025** while the judgement which the defendant is seeking to appeal against was delivered on **24th September, 2024**, this is 1 year later. Ideally, Notice of

Appeal ought to have been filed 14 days from the date of

judgement i.e., on or about **7th September, 2024.**

Remember, delay defeats equity.

18. In the circumstances and pursuant to Rule 58(1) of the Court of Appeal Rules, I'm inclined to exercise my discretion and dismiss the application dated 9th October, 2025.

19. Consequently, the Notice of Motion dated 9th October, 2025, is dismissed. There are no orders as to costs.

Dated and delivered at Nairobi this 6th day of March, 2026.

(DR.) J. O. OKELLO

.....
JUDGE OF APPEAL

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

Signed _

DEPUTY

REGISTRAR