IN THE COURT OF APPEAL AT NAIROBI

(CORAM: MURUNGI B. KAIRARIA, J.A.(IN CHAMBERS))

CIVIL APPLICATION NO. E613 OF 2025

BETWEEN

NANCY WAMBUI THAIRU.....APPLICANT

AND

BENJACK KAMINJA GATUNE.....RESPONDENT

(Being an application for orders of leave to file appeal against the judgment/decree of the High Court of Kenya at Nairobi (Nyaundi Patricia Mande, J.) delivered on 21st March, 2025

in

HCCC No. 51 of 2017 (OS))

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RULING

1. This ruling relates to a Notice of Motion application dated 21st October 2025 brought by Nancy Wambui Thairu (the applicant) against Benjack Kaminja Gatune (the respondent).
2. Although the application is expressed to be brought under Rule 4 of the Court of Appeal Rules, which grants this Court unfettered discretion to extend time for the doing of any act authorized or required by the Rules on such terms as may be just, prayer 2 in the Notice of Motion does not in fact seek extension of time to file an

appeal, but rather seeks leave to file an appeal.

3. The said prayer reads:

> *"That this Honourable Court be pleased to grant the Applicant herein leave to file an appeal against the judgment/decree of the Hon. Lady Justice Nyaundi Patricia Mande delivered on 21st March 2025 in Nairobi High Court Civil Suit No. 51 of 2007 (O.S)."*

4. Similarly, the heading of the application reads:

> *"APPLICATION FOR ORDERS OF LEAVE TO FILE APPEAL AGAINST THE JUDGMENT/DECREE OF THE HON. LADY JUSTICE NYAUNDI PATRICIA MANDE DELIVERED ON 21st MARCH 2025 IN NAIROBI HIGH COURT CIVIL SUIT NO. 51 OF 2017 (O.S)."*

5. It is trite law that parties are bound by their pleadings, and a court of law cannot grant prayers or orders that have not been sought by the parties (see ***Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR***).

6. That being the position in law, it is my finding that this Court lacks jurisdiction to grant extension of time in circumstances where a party files an application for leave to appeal instead of an application for extension of time, yet invokes Rule 4 and urges the Court in the supporting affidavit to extend time for filing the appeal, as the Applicant has done in the present case. Accordingly, and for that reason, I decline to grant the application and dismiss it.

7. Additionally, having carefully considered the affidavit in support of the application and the submissions in support thereof dated 24th February 2026 as well as the Respondent's submissions dated 23rd February,2026 in opposition thereto. I am not persuaded that extension of time would have been merited even if the Court had been properly moved and a specific prayer in that regard made.

8. The matters that this court takes into consideration in determining whether or not to grant extension of time in exercise of discretion under Rule 4 were set out succinctly in Leo ***Sila Mutiso vs Hellen Wangari Mwangi*** [1999] 2 EA 231. They are; the length of the delay,the reason for the delay ,possibly the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted.

9. The judgment sought to be appealed was delivered on 21st March 2025.

The notice of appeal was lodged timeously on 24th March2025. Consistent with Rule 84[1] the appeal ought to have been lodged within 60 days that is by 20th May 2025 delay. The instant application was filed on 21st October,2025 which is a delay of about four[4] or so months and not seven months as contended by the Respondent which I find is not inordinate.

10. However the reason for the delay in filing the record of appeal has not been satisfactorily explained. The applicant has blamed the previous counsel for failing to file the appeal, without evidence that instructions were indeed given to the advocate to do so. The filing of a notice of appeal merely signals intention to appeal. At the very least the applicant ought to have tendered evidence that she gave instructions to counsel to institute the appeal following the filing of the notice of appeal.
11. While I agree that mistakes of counsel should not be visited upon the litigant as submitted by the Applicant a party seeking to rely on that principle ought in my view to prove that instructions were given and to identify the mistake that is attributed to the advocate for the principle to come into play. The case of ***Kiarie vs Njuguna & 2 others*** is

    distinguishable from the facts of this case in that in the former case the delay of about 35 days was explained on the basis of the time taken in changing advocates.
12. In the instant case there is no plausible reason given why the applicant took four months to discover that her intended appeal was not filed. Merely blaming the previous advocate is not a sufficient reason to warrant the exercise of this Court's discretion under Rule 4 of the Court of Appeal Rules.

13. No evidence has been placed before the Court to demonstrate that instructions were issued to the Applicant's previous advocate to file the appeal. Neither was any evidence tendered to show that the applicant proactively pursued the filing of the appeal following the lodging of the Notice of Appeal, or at all.
14. There is no indication in the supporting affidavit that a letter requesting for typed proceedings was lodged with the Superior Court and copied to the opposite party within thirty (30) days of the judgment sought to be appealed against, as required by the proviso to Rule 84(1), and none has been exhibited.
15. The present application was filed on 21st October 2025, a period of over four months after 23rd May 2025 when the applicant reckons was the cutoff date for filing of the appeal.
16. Extension of time is not a right but a discretionary equitable remedy that must be sufficiently justified by the party seeking the indulgence of the Court. The burden lies squarely on the applicant to satisfy the Court (see ***Nicholas Kiptoo Arap Salat v IEBC & 7 Others [2014]***) KESC12

    KLR.
17. Further, parties must demonstrate active interest in their cases; merely blaming an advocate is not a sufficient reason (see ***Rajesh Rughani v***

Fifty Investments Ltd & Another) [2016] eKLR.

18. I am also not persuaded that the Applicant would possibly have met the test of whether the intended appeal had chances of succeeding. Though I am not required to make definite findings on this aspect of the matter, I nevertheless note from the judgment intended to be appealed that the learned judge found as a fact that the deed of separation which the applicant sought to invalidate had previously been declared valid by a court of competent jurisdiction in earlier proceedings between the same parties (HCFCA No. 147 of 2019), where the applicant defended its validity and that decision was not challenged on appeal.
19. In the upshot, and for the reasons set out above, the Notice of Motion dated 21st October 2025 is hereby dismissed. There shall be no orders as to costs, considering that the respondent did not file a replying affidavit in opposition to the application.

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

MURUNGI B. KAIRARIA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR