

**IN THE COURT OF APPEAL
AT NAIROBI**

CIVIL APPEAL (APPLICATION) NO. E770 OF 2025

(CORAM: NDERI, JA (IN CHAMBERS))

BETWEEN

JOSEPH KURIA GITHINJI.....APPLICANT

AND

MERCY WANJIRU KURIA.....RESPONDENT

(Being an application for extension of time to lodge and serve a Notice of Appeal out of time against the Judgment of the High Court of Kenya at Nairobi (E.K. Ogola, J.) dated 31st July 2025)

in

Civil Suit No. 78 of 2017 (OS)

RULING

1. This is an application brought under **Rule 4** of the Court of Appeal Rules, **Sections 3A** and **3B** of the **Appellate Jurisdiction Act**, and **Article 159** of the Constitution of Kenya, 2010. The Applicant seeks extension of time to file and serve a Notice of Appeal and/or record of appeal against the judgment

of the High Court (Family Division) delivered on 31st July 2025 in **Nairobi High Court Civil Suit No. 78 of 2017 (OS)**.

2. The Applicant, being dissatisfied with the judgment of the High Court, instructed his then advocates to lodge an appeal. However, no steps were taken within the prescribed timelines. The Applicant has now moved this Court seeking extension of time, contending that the judgment was prejudicial as it awarded the Respondent a disproportionately large share of prime matrimonial property without valuation or evidence of contribution; that the delay was occasioned by the negligence of previous counsel despite clear instructions to appeal; that the intended appeal raises arguable points of law and fact with high chances of success; and that the delay is not inordinate, and the Respondent will suffer no prejudice if extension is granted. The Respondent has not demonstrated any prejudice that would arise from the grant of the orders sought.
3. The application is not opposed by the respondent despite service by both the court and the applicant. Further filed

written submissions.

4. Rule 4 of the Court of Appeal Rules vests this Court with unfettered discretion to extend time for filing an appeal, provided such discretion is exercised judicially. The guiding principles include the length of delay, the reason for delay, the chances of success of the intended appeal, and the degree of prejudice to the Respondent (see **Leo Sila Mutiso v Rose Hellen Wangari Mwangi** [1999] 2 EA 231).
5. The Court in **United Arab Emirates V Abdel Ghafar & Others** 1995 IR LR 243 cited with approval in **Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others** (2014) eKLR that:

“.....the grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively, or at whim or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the appeal tribunal. The result of the exercise of a discretion is not dictated by any set factor. Discretions are not packaged, programmed responses.”

2. As Sir Thomas Bingham M.R. pointed out in Costellow V Somerset CC (supra) at page 956 C, times problems arise at the intersection of two principles, both salutary, neither absolute.The first principle is that the Rules of court and the associated rules of practice,

deserved in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time

limits are not targets to be aimed at or expressions of pious hope but requirements to be met.....”.

The second principle is that.....a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of cost cannot compensate.....”

3. The approach indicated in these two principles is modified to the stage which the relevant proceedings have reached. If for example, the procedural default is in relation to an interlocutory step in proceedings, such as a failure to serve a pleading or give discovery within the prescribed time limits, the court will, in the ordinary way and in the absence of special circumstances, grant an extension of time. Unless the delay has caused irreparable prejudice, to the other party, justice will usually favour the action proceeding to a full trial on the merits.”

6. Further, in **Andrew Kiplagat Chemaringo v Paul Kipkorir**

Kibet [2018] eKLR, the Court emphasized that

“a plausible satisfactory explanation for delay is the key that unlocks the Court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

7. The judgment herein was delivered on 31st July 2025, while the present application was filed on 18th December 2025. A delay of about four and a half months is not inordinate,

especially given

the explanation offered. The record shows that the Applicant

subsequently appointed M/S Kiarie, Joshua & Company Advocates to act in place of Koceyo & Company Advocates, and a Notice of Change of Advocates was duly filed and served on 18th December 2025.

8. I note that the application was duly served upon the Respondent, as evidenced by the affidavit of service sworn on 15th January, 2026, yet no response or replying affidavit has been filed to oppose the application. The Respondent has therefore not demonstrated any prejudice that would arise from the grant of the orders sought.
9. Courts have consistently held that litigants should not be punished for mistakes of counsel where justice can still be served. The Applicant raises weighty issues regarding division of matrimonial property, contribution, and valuation. Without going into detail of the grounds advanced by the applicant lest I embarrass the bench that may hear the appeal, these are not frivolous and warrant consideration on appeal. The Respondent has not shown any prejudice that would outweigh the Applicant's constitutional right to be heard on appeal.

10. In the circumstances, I am satisfied that the Applicant has met the threshold for extension of time under Rule 4. Accordingly, the Applicant is granted extension of time to file and serve the Notice of Appeal and Record of Appeal against the judgment of the High Court delivered on 31st July 2025.
11. The Notice of Appeal already lodged shall be deemed as duly filed within time. The Applicant shall file and serve the Record of Appeal within **forty-five (45)** days from the date hereof. Costs of this application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 27th day of February 2026.

NDUMA NDERI

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.