

**IN THE COURT OF APPEAL  
AT NAIROBI  
CIVIL APPLICATION NO. NAI. E555 OF  
2025 (CORAM: ONGUDI, JA (IN  
CHAMBERS))**

**BETWEEN**

**KENYA COMMERCIAL BANK.....APPLICANT**

**AND**

**JOANES OTIENO OFWA.....RESPONDENT**

*(Being an application for extension of time to file and serve the  
Memorandum of Appeal and record of Appeal respectively out of time in an  
intended appeal from a judgment of the High Court of Kenya at Milimani (F.  
Addayi, J) delivered on 2<sup>nd</sup> December, 2024*

*in*

***Milimani High Court Civil Appeal No. E337 of 2022)***

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**RULING**

1. This is the Notice of Motion dated 17<sup>th</sup> September, 2025 where the applicant is seeking leave to file and serve the memorandum of appeal and record of appeal out of time. The impugned judgment was delivered on 2<sup>nd</sup> December, 2024 and a Notice of Appeal filed on 2<sup>nd</sup> January 2025. This was within time because the applicant had been granted 30 days within which to file its appeal.
2. The application has been opposed by the respondent who argues that a delay of 280 days is in ordinate. Further that the reason given for the delay does not hold water at

all. He

says there is no documentary evidence to show any diligent steps taken by the applicant within the statutory period.

3. It's argued that allowing the appeal to be filed out of time will undermine the principle of finality in litigation, and will cause irreparable prejudice to the respondent.
4. Both parties filed written submissions. The applicant's submissions were filed by MNM Advocates LLP and are dated 14<sup>th</sup> October 2025. It is counsel's submission that the application meets the threshold set under Rule 4 of the Court of Appeal Rules. That the delay has been satisfactorily explained, the intended appeal raises arguable points of law and no prejudice will be occasioned to the respondent.
5. On the other hand the respondent's submissions were filed by the respondent in person and are dated 20<sup>th</sup> October, 2025. The respondent relied on the case of **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others [2014] eKLR** in setting out what the applicant had to prove. On the issue of delay he argues that the same is inordinate since it took the applicant 280 days to file the present application. That the reason given is not

sustainable. He referred to the case of **Bi-Mach Engineers Limited vs. James Kahoro**

**Mwangi[2011] eKLR** in support. He further argues that any further delay herein will prejudice him.

6. I have considered the application, affidavits, both submissions, cited authorities and the Law. The issue I find falling for determination is whether the application herein is merited.

7. In the case of **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others [2014] eKLR**, the Supreme Court set the following major pillars for consideration in an application of this nature. They are as follows:

- **Extension of time is discretionary.**
- **The applicant must satisfactorily explain the delay.**
- **Application must be made promptly.**
- **Whether granting the extension will be prejudicial to the respondent.**
- **Whether the intended appeal is arguable.**
- **Is public interest involved?**

8. There is no dispute that the Notice of Appeal was filed within the set timelines. It is the memorandum of appeal and the record of appeal which fell out of the timeliness. It is true the applicant requested for typed proceedings and ruling. A certificate of delay was issued on 12<sup>th</sup> August 2025 (annexture HA3). The contents of the said certificate show that the period of typing of proceedings/ruling was 20<sup>th</sup>

December 2024 to 24th April, 2025 which is one hundred and twenty five (125) days.

9. In its supporting affidavit the applicant averred that counsel were notified of the readiness of the proceedings for collection on 24<sup>th</sup> April, 2025. However, the certificate of delay was only issued on 12<sup>th</sup> August, 2025. This court would have expected the Deputy Registrar to tell the court something about this disparity. If the proceedings were indeed ready for collection on 24<sup>th</sup> April 2025, why was the certificate issued on 12<sup>th</sup> August, 2025 and not when the proceedings were ready for collection? Had this clearly come out then the applicant would seriously be to blame for the delay. Nobody has explained this disparity.
10. The record shows that the High Court on 27<sup>th</sup> January, 2025 made an order for the decretal sum to be deposited by the applicant in a joint account of the counsel for both parties which was done on 26<sup>th</sup> February, 2025. This was before the hearing of the first appeal before the High Court.
11. There is no evidence that the said amount has been withdrawn. Besides that amount which was a special damage in terms of refund, the High Court awarded the

respondent Kshs. 1,500,000/= as general damages. This  
is

also contested by the applicant. It would only be fair that, this is also weighed by this court by hearing the appeal.

12. I have equally perused the draft memorandum of appeal and find that the grounds are not idle. Upon due consideration of all these pillars, I am satisfied that the Notice of Motion dated 17<sup>th</sup> September, 2025 has merit and is allowed. Time is extended for the applicant to file and serve its memorandum of appeal and record of appeal within ten (10) days from today's date.

13. Costs in cause.

Orders accordingly.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of February, 2026.**

**H.I. ONG'UDI**

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**JUDGE OF APPEAL**

*I certify that this is the  
true copy of the original  
signed*  
**DEPUTY REGISTRAR**