

**IN THE COURT OF
APPEAL AT
NAIROBI**

**CORAM: JOEL NGUGI, JA (IN
CHAMBERS) CIVIL APPLICATION NO.
E543 OF 2025**

BETWEEN

TIMON KIPKEMEI ROTICH.....APPLICANT

AND

JUDICIAL SERVICE COMMISSION.....RESPONDENT

*(Being an Application for extension of time to Appeal
against part of the Judgment of the Employment and
Labour Relations Court at Nairobi, (Ongaya, J.) dated 23rd
July, 2025*

in

ELRC Cause No. E772 of 2022)

RULING

1. This is an application dated 27th August, 2025 brought under Rule 4 of the Court of Appeal Rules, 2022. The Applicant seeks, in substance, the following reliefs:

(2) That this Honourable Court be pleased to grant leave to the Applicant to file and serve an appeal out of time against part of the Judgment of Honourable Justice Byram Ongaya delivered on 23rd July, 2025.

(3) That the annexed draft Memorandum of Appeal be deemed as duly filed and served upon payment of the requisite fees. The

***application therefore seeks leave to regularise
the filing of the intended***

appeal itself, as opposed to leave to file or validate a Notice of Appeal.

2. The application is supported by the affidavit of the Applicant sworn on 27th August, 2025. In response, the Respondent filed Grounds of Opposition dated 14th January, 2026 and subsequently filed written submissions. At the outset, it must be observed that “grounds of opposition” are not a recognised pleading under the Court of Appeal Rules, 2022. That said, the Respondent’s position is now fully articulated in its written submissions, and in keeping with the Court’s duty to determine matters on substance rather than form, I have considered the Respondent’s opposition on its merits.
3. In support of the application, the Applicant depones that he was partly successful before the ELRC but is dissatisfied with aspects of the judgment. He states that he instructed his advocates to lodge an appeal but that the advocates were unable to do so within time. The Applicant seems to give three different reasons for the delay. In the supporting affidavit, the delay is attributed to inadvertent difficulties in obtaining certified copies of the judgment and proceedings. In the body of the application, the delay is framed as an inadvertent error not attributable to the Applicant. In the written submissions, yet another explanation is introduced, namely that the delay was caused by systemic challenges with the Judiciary’s e-filing platform. These multiple explanations form the factual basis upon which the Court is invited to exercise its discretion.

4. In opposing the application, the Respondent submits that the Applicant failed to comply with the timelines set out under Rules 77 and 79 of the Court of Appeal Rules, 2022; that a Notice of Appeal does not require typed proceedings and, therefore, no sufficient reason for delay has been demonstrated; that the Applicant has not sought to regularise the allegedly defective Notice of Appeal; and that extension of time is an equitable remedy which the Applicant does not deserve. Reliance was placed on the decisions of the Supreme Court in ***Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR*** and ***University of Eldoret & Another v Hosea Sitienei & 3 others [2020] eKLR***.
5. Rule 4 of the Court of Appeal Rules, 2022 provides as follows:

“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.”
6. The principles guiding the exercise of the Court’s discretion under Rule 4 are well settled. The discretion is wide and unfettered, but it must be exercised judicially, on reason, and not on whim.
7. In ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999] 2 EA 231***, this Court stated:

“It is now well settled that the decision whether or not to extend the time for appealing 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 the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”

8. Applying those principles to the present application, I begin with the length of the delay. The impugned judgment was delivered on 23rd July, 2025. The present application was filed on 27th August, 2025. While the Respondent correctly points out that the Notice of Appeal was not filed within the strict timelines contemplated by the Rules, the delay disclosed is, in the overall context, modest and not inordinate.
9. However, as regards the reason for the delay, the shifting explanations offered by the Applicant is curious. In the supporting affidavit and in the body of the application, the Applicant attributes the delay to inadvertent error and to difficulties in obtaining certified copies of the judgment and proceedings. Notably, no particulars are given at all as to what the alleged inadvertent error entailed, how it occurred, or who was responsible for it. That explanation is immediately problematic, because, as correctly pointed out by the Respondent, a Notice of Appeal does not require typed proceedings or a certified judgment. Waiting for proceedings

cannot, therefore, explain the failure to lodge a Notice of Appeal within time.

10. More fundamentally, the Applicant's own submissions introduce a different and inconsistent explanation. At paragraph 6 of the submissions, the Applicant states that upon judgment being delivered, the Notice of Appeal was filed late due to systemic issues with the Judiciary e-filing system. This explanation bears no relationship to the one advanced in the affidavit. The delay is no longer attributed to lack of proceedings, but to alleged systemic failures in the e-filing platform.
11. The Court is, therefore, confronted with multiple shifting explanations for the same delay. In one breath, the delay is blamed on the absence of certified proceedings; in another, on inadvertent error; and in yet another, on systemic failure of the Judiciary's electronic platform. These explanations are not only inconsistent; they are mutually destructive. They cannot all be true, and taken together they point not to an honest mistake but to a lack of candour in the manner in which the Applicant has presented his case to the Court.
12. Candid, coherent and consistent explanation is the key that unlocks the Court's discretion under Rule 4. Where an applicant advances contradictory or pretextual explanations, the Court cannot exercise discretion on the basis of speculation or conjecture. As this Court stated in ***Muringa Company Ltd v Archdiocese of Nairobi Registered Trustees*** [2020] eKLR:

“The discretion of the Court under Rule 4 is not available to a party who does not place

before

the Court a candid, plausible and consistent explanation for the delay.”

13. The same principle was reiterated in ***County Executive of Kisumu v County Government of Kisumu & 8 others*** [2017] eKLR, where the Court stated:

“An applicant who offers contradictory or shifting explanations for delay cannot be said to have approached the Court with clean hands. Such conduct disentitles the applicant from the exercise of discretion.”

14. The Supreme Court in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*** [2014] eKLR similarly emphasised:

“Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court, and the party who seeks it must demonstrate honesty, good faith and diligence.”

15. The lack of candour is compounded by a further structural defect in the application. The Applicant seeks leave to file the appeal itself out of time, yet did not timeously file a Notice of Appeal and has not properly sought leave to regularise that foundational step. Even if the present application were allowed, it would not cure the absence of a competent Notice of Appeal anchoring the intended appeal. The prayer to deem a memorandum of appeal as duly filed, in the absence of a valid or regularised Notice of Appeal, is conceptually incoherent and legally futile.

16. In short, while the length of delay is not inordinate, the Applicant has failed to place before the Court a credible, candid and coherent explanation for that delay. Without such explanation, the equitable discretion under Rule 4 is simply not available. The Court is, therefore, unable to exercise discretion in favour of the Applicant. Quite apart from the lack of candour, the application is structurally flawed: the reliefs sought would, in any event, be futile in the absence of a prayer seeking leave to file the anchoring document — the Notice of Appeal — out of time, without which there is no jurisdictional foundation upon which an appeal can stand.

17. In the result, the application dated 27th August, 2025 is dismissed.

18. The Applicant shall bear the costs of the application.

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

JOEL NGUGI

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..... **JUDGE OF
APPEAL**

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

Signed
DEPUTY REGISTRAR