

**IN THE COURT OF
APPEAL AT ELDORET**

(CORAM: KORIR, J.A. - (IN

CHAMBERS)) CIVIL APPLICATION NO.

E010 OF 2026

BETWEEN

HEZRON MWANGI.....APPLICANT

AND

**FLOMENA TERIKI KIMAIYO
AND JEPKOSGEI KORIR**

(Suing as legal representatives of the estate of

NICODEMUS KIPKORIR KIMUTAI).....RESPONDENT

(Being an application for leave to file a Notice of Appeal and Record of Appeal out of time against the judgment and decree of the High Court at Eldoret (Ominde, J.) issued and dated 12th March 2025

in

HCCA No. E168 of 2024)

R U L I N G

1. The applicant's notice of motion dated 9th February 2026 seeks enlargement of time to file and serve both the notice of appeal and the record of appeal. The application is supported by his affidavit wherein he avers that after the impugned judgment was delivered on 12th March 2025, he filed a notice of appeal on 21st March 2025, which was within time. Thereafter, he sought typed proceedings vide letter dated 20th March 2025, and that the proceedings were indeed issued on or about 15th July 2025.

2. The applicant further deposes that when his advocates sought to lodge the record of appeal, the court's e-filing system generated an invoice for Kshs. 100,800 instead of the requisite fee of Kshs. 6,000, and despite efforts by his counsel to have the anomaly rectified, the system remained unyielding. It is his averment that after they were informed that the invoiced amount had to be paid, his advocates forwarded the erroneous invoice to the insurer, Madison General Insurance, which remitted the money to the advocates on 7th January 2026. According to the applicant, it was during this period of waiting for the correction of the system-generated error that the respondent successfully moved the Court to strike out his notice of appeal. The applicant avers that the delay was not of his making, that it is not inordinate, and that his intended appeal is arguable.
3. Opposing the application, Flomena Kimaiyo avers that the intended appeal, being a second appeal limited to matters of law, is not arguable, and that the reasons advanced for the delay are not plausible. She reiterates the dictum that litigation must come to an end and asserts that allowing the application is prejudicial to the respondent.
4. When the application came up for virtual hearing on 5th March, 2026, learned counsel Mr. Kitiwa for the applicant and learned counsel Mr. Korir for the respondent adopted the written submissions which they had filed prior. I have gone through the submissions, where counsel have reiterated the respective

positions of their clients.

5. I have carefully considered the application, the affidavits, and the submissions. The law on extension of time under **rule 4** of the **Court of Appeal Rules, 2022**, is well settled. As this Court has stated time without number, the exercise of discretion under this rule is intended to ensure that no injustice is visited upon a litigant and that extension of time is not a right that accrues to a party unless the reason and period of delay are sufficiently explained. The principles guiding the exercise of this discretion were succinctly laid out in the case of **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [1999] 2 EA 231**, where the Court stated that in considering an application for extension of time, the court takes into account the length of the delay; the reason for the delay; the chances of the appeal succeeding if the application is granted; and the degree of prejudice to the respondent if the application is allowed.
6. The foregoing principles apply to the present application. It is not in dispute that the judgment sought to be appealed was delivered on 12th March 2025. The applicant filed an initial notice of appeal on 21st March 2025, which was within the 14 days allowed by the rules. He also applied for proceedings on 20th March 2025. The proceedings were ready for collection on 15th July 2025. The applicant was therefore entitled to the benefit of the proviso to **rule 84(1)** of the Court's Rules, which excludes the period taken to prepare and supply the proceedings from the computation of time for filing the appeal. Therefore, the time for filing the appeal

could only start running after the applicant was supplied with the proceedings.

7. However, the applicant avers, without any resistance from the respondent, that he encountered a hurdle not of his own making. When his advocates attempted to file the appeal, the court's e-filing system presented an erroneous invoice for Kshs. 100,800. This was clearly an administrative glitch. The error persisted for some time, and while the advocates were seeking correction of the error, the respondent seized the initiative and successfully moved the Court to strike out the notice of appeal. It is averred by the applicant that by the time the insurer remitted the erroneously invoiced fees on 7th January 2026, the applicant's notice of appeal had already been struck out.
8. In my considered view, the delay in filing the record of appeal was not inordinate or intentional. The proceedings were only ready in July 2025, and the intervening period between then and January 2026 was spent on a genuine attempt to address an error caused by the court's system. It is only after the applicant was informed that the error could not be rectified and that he had to pay the invoiced amount that his counsel wrote to the insurer to provide funds for paying the Court fees. As soon as the funds were received, the applicant promptly moved the Court on 9th February 2026 for extension of time. I find this explanation to be plausible and credible. A litigant should not be penalised for the mistakes or administrative lapses of the Court or its systems.

9. In **East Africa Televisions Network Ltd vs. Communications Commission of Kenya [2000] eKLR**, the Court allowed an application for enlargement of time where a notice of appeal had been struck out, finding that a delay of 5 weeks was occasioned by his endeavour to regularize the defects in the order intended to be appealed against.
10. The respondent's primary objection is that the intended appeal is not arguable as it is a second appeal and therefore limited to matters of law. While it is true that this Court's jurisdiction on a second appeal is confined to points of law, that fact of itself does not render an appeal unarguable. A second appeal will only be competent if it raises issues of law, but it is not for a single judge at this interlocutory stage to determine definitively whether the intended appeal raises such issues. The applicant has indicated that he has an arguable appeal. It is sufficient for me to note that an arguable appeal is not one that must succeed, but one that is not frivolous and warrants the Court's interrogation on appeal. I am therefore not persuaded that the intended appeal is hopeless.
11. On the question of prejudice, the respondent contends that allowing the application would prolong litigation. However, the respondent has not demonstrated any specific prejudice that cannot be compensated by way of costs. The applicant is pursuing his constitutional right of appeal, and the Court must be slow to shut him out. As Madan, J.A famously stated in **Belinda Murai & 9 Others vs. Amos Wainaina [1979]**

KECA 25 (KLR), the door of justice should not be closed against a litigant

because of a mistake of counsel. He went ahead to warn that a static system of justice would not be efficient, and that change is constant and justice being a living, moving force, the role of the judiciary is to keep the law marching in time with the trumpets of progress. In the matter before me, I appreciate that the glitch encountered by the applicant was as a result of the e-filing and billing system, and I must be alive to the challenges that counsel and litigants continue to face while interacting with this relatively new way of doing things.

12. Having considered all the factors, I am satisfied that this is a proper case for the exercise of my discretion in favour of the applicant. The delay has been sufficiently explained, the intended appeal is not frivolous, and the respondent has not demonstrated any prejudice that cannot be remedied by an award of costs. Consequently, the notice of motion dated 9th February 2026 is hereby allowed on the following terms:

- i. The applicant is granted leave to file and serve the notice of appeal together with the record of appeal within 14 days from the date of the delivery of this ruling; and***
- ii. The costs of this application shall abide by the outcome of the intended appeal.***

Dated and delivered at Eldoret this 17th day of March 2026.

W. KORIR

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

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

Signed
DEPUTY REGISTRAR