IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OKONG'O J.A (IN CHAMBERS)

CIVIL APPLICATION NO. NAI E762 OF 2025

BETWEEN

ADEN HUSSEIN MAHAD.....APPLICANT

AND

JOY JENIPHER ADERO ACHOLA &
EVERLYNE ODETE OCHOLA
(Suing as legal representatives of the estate of **JECHONIA OLIVER ACHOLA NDINYA).....RESPONDENT**

AND

KIBAGENDI ROBERT OTACHI .....1ST INTERESTED PARTY FREDRICK KIMEMIA KIMANI ..... 2ND INTERESTED PARTY REGISTRAR OF TITLES, NAIROBI LAND REGISTRY ..... 3RD INTERESTED PARTY

*(An application for extension of time to file and serve a Record of Appeal out of time in an intended appeal from the Judgment of the Environment and Land Court at Milimani (**B. M. Eboso, J**.) delivered on 17th November 2025*

in

Milimani ELC No. 361 of 2017)
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RULING

1. What is before me is a Notice of Motion application dated 18th December 2025 brought by the applicant under,

among others, **Rule 4** of the Court of Appeal Rules (**the Rules**)

seeking extension of time to file a Notice of Appeal against the judgment of the superior court delivered on 17th November 2025. The application is supported by the applicant's affidavit, sworn on 17th December 2025. The applicant has averred that he is dissatisfied with the said judgment and wishes to appeal against the same. The applicant has averred that, at the time the judgment was delivered, he was sick and seeking treatment in Ethiopia. The applicant has averred that he arrived in Kenya after the superior court judgment had been delivered and the time to file a Notice of Appeal had lapsed. The applicant has averred that his failure to file a Notice of Appeal was due to his illness and being out of the country. The applicant has averred that he was unable to communicate with his advocates in Kenya and, as a result, was not aware of developments in his case. The applicant has annexed several documents to his affidavit in support of the application, including records of his travels and treatment while in Ethiopia.

2. The application is opposed by the respondents through a replying affidavit sworn by Joy Jenipher Adero Achola on

16th February 2026. The respondents have averred that the

applicant's advocates in the superior court were served with a notice for the delivery of the impugned judgment, but chose not to attend court. The respondents have averred that the applicant has not demonstrated with credible evidence that he was out of the country when the judgment was delivered and had difficulty communicating with his advocates. The respondents have contended that the firm of Osundwa & Company Advocates, which has brought the present application on behalf of the applicant, did not act for the applicant in the superior court and did not seek the leave of that court to act for the applicant. The respondents have contended that the Notice of Appeal filed by that firm on behalf of the applicant is fatally defective. The respondents have urged the court to dismiss the application with costs.

3. The application was heard through written submissions. The applicant filed submissions dated 20th February 2026, while the respondents filed submissions dated 16th February 2026. I have considered the applicant's application together with the affidavit filed in support thereof. I have also considered the respondents' replying

affidavit. Finally, I have considered the parties’ advocates' written submissions. Rule 4 of the

Rules 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 a superior count, for the doing of any act authorized or required by the 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. "**

4. In the case of ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others*** *[2014] eKLR,* the Supreme Court laid out the following general principles on applications for extension of time:

> ***"From the above case law, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant..., we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:***
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> 1. ***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;***
>
> 2. ***A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
>
> 3. ***Whether the court should exercise the***

discretion to extend time, is a consideration to be made on a case to case basis;

4. ***Whether there is a reasonable reason for the delay. The delay should be explained to the***

satisfaction of the court;

5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time. "

5. In ***Fakir Mohammed v. Joseph Mugambi & 2 others [2005] eKLR (Civil Application No. Nai. 332 of 2004 (Nyr. 32/04))***, the court stated that:

> ***"The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the stricture of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors."***

6. In **Mwangi *v. Kenya Airways Ltd* *(2003) KRL 486,*** the Court stated that:

> ***"Over the years, the Court has set out guidelines on what a single Judge should***

consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila

Mutiso vs. Rose Hellen Wangari Mwangi (Civil Application No. Nai 255 of 1977) (unreported), the Court expressed itself thus:

"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."

7. In **Andrew Kiplagat Chemaringo *v*. Paul Kipkorir Kibet**

[2018] KECA 701 (KLR), the Court stated that:

"[12] The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and 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."

8. Rule 4 of the Rules gives this court unfettered discretion to grant an extension of time. That discretion must, however, be exercised judiciously. Under Rule 77 of the Rules, the applicant should have filed a Notice of Appeal by 1st December 2025. The present application was filed on 18th December 2025, 17 days after the expiry of the time

within which the

Notice of Appeal should have been filed. The delay in filing the

Notice of Appeal and the present application was therefore not inordinate, a fact admitted by the respondents in their submissions. The respondents have opposed the application not on the grounds of inordinate delay but on other technical and substantive grounds. The respondents have contended that the advocates who are seeking to file a Notice of Appeal out of time on behalf of the applicant are not on record for the applicant in the superior court. The respondents have also contended that the applicant has not placed before this court credible evidence showing that he was in Ethiopia for treatment when the impugned judgment was delivered. The respondents have contended that nothing short of a copy of a stamped passport can prove that the applicant left Kenya for Ethiopia and returned after the delivery of the impugned judgment. The respondents have contended that, in view of the advancement in technology, the applicant's contention that he could not communicate with his advocates is far from the truth.

9. I find no merit in the respondents' contention that the firm of Osundwa & Company Advocates is not properly on

record in these proceedings. I can see no hindrance, procedural or

otherwise, to a party who wishes to appeal against a decision of a superior court, engaging a firm of advocates who never acted for him in that court to represent him in the appeal. I find no merit in that objection to the present application. On proof of the applicant having been out of the country when the impugned judgment was delivered, I disagree with the respondents' contention that departure from Kenya to a neighbouring country and re-entry can only be proved by a passport.

10. I am satisfied from the evidence placed before the court by the applicant that during the period when the impugned judgment was delivered, the applicant was in Ethiopia for treatment. On whether the Applicant could still communicate with his advocates even from Ethiopia, I believe this would depend on many factors. The applicant has averred that he was unable to communicate with his advocates due to his illness and stay in Ethiopia for treatment. The applicant has produced evidence showing that he was sick and that he travelled to Ethiopia by both road and air to seek treatment. In the circumstances, I have no reason to disbelieve his statement that he was

not able to communicate with his

advocates. I believe that when one is sick and seeking treatment in a foreign country, one's priority is one's health. A pending court case is not a matter of life and death, and cannot be expected to occupy the minds of litigants, even those facing life-threatening situations.

11. I am satisfied that the applicant has given a reasonable explanation for the delay in filing the Notice of Appeal. As I stated earlier in the ruling, the delay is not inordinate. The application before the court was also filed without an unreasonable delay. There is no evidence that the respondents would suffer any prejudice if the order sought is granted.

12. For the foregoing reasons, the application before me has merit. The same is allowed. The applicant shall file the Notice of Appeal within 21 days from the date hereof.

Dated and delivered at Nairobi this 13th day of March 2026.

S. OKONG'O

.....

JUDGE OF APPEAL

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

Signed

DEPUTY

REGISTRAR.