

**IN THE COURT OF  
APPEAL AT  
NAIROBI**

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

**CIVIL APPEAL (APPLICATION) NO. E396 OF  
2021**

**BETWEEN**

**EVANS MBURU MUTHEMBA .....1<sup>ST</sup>  
APPELLANT ROBERT NDARU GICHONI ..... 2<sup>ND</sup>**

**AND**

**DELMONTE (K) LIMITED RESPONDENT**

**Record of Appeal out of time in an intended appeal from the Judgment of the High Court of Kenya  
in**

**High Court Civil Case No. 220 of 2006)**

**\*\*\*\*\***

**RULING**

- 1. What is before me is an application brought principally under Order 51 of the Rules of the High Court of Kenya. The application has been brought by the 2<sup>nd</sup> appellant**

**(hereinafter referred to only as “the applicant”) by way of a  
APPELLANT/APPLICANT**

Notice of Motion dated 10<sup>th</sup> December 2025. The applicant has sought leave to file a record of appeal out of time. The application is supported by the applicant's

affidavit dated 10<sup>th</sup> December 2025. 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 court, 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."***

2. In the case of ***Nicholas Kiptoo Arap Korir Salat v.***

**Independent Electoral and Boundaries Commission & 7 Others [2010] 1 KLR 100.**

**"From the above case law, it is clear that the discretion to extend time is not a right of a party. It is an equitable remedy."**

**1. Extension of time is not a right of a party. It is an equitable remedy.**



***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, pub**
- 3. The application before the court will be considered on the for duty. The Applicant has averred that he filed a notice of**

**appeal on 27<sup>th</sup> August 2018, and thereafter changed advocates from Onyango Oyieko & Associates to Waithira Mwangi & Co. Advocates in May 2019. The Applicant has averred that his new advocates assured him that they will file a record of appeal. The Applicant has averred that in November 2025, his new advocates, Waithira Mwangi & Co. Advocates, informed him that they would**

no longer act

for him in the matter. The Applicant has averred that  
on

18<sup>th</sup> November 2025, he appointed another firm of advocates, Munyiva Muli Advocates & Associates, to act for him. The Applicant has averred that, upon perusal of the court file, the new firm of advocates noted that no record of appeal had been filed.

4. The Applicant has contended that he was unaware that his previous advocates had not filed a record of appeal, having been assured that they had. The Applicant has contended that his failure to file a record of appeal on time was occasioned by his former advocates' mistake or indolence, which should not be visited upon him. The Applicant has averred that his advocates, now on record, had written to the Deputy Registrar of the superior court seeking typed proceedings. The Applicant has averred that he has an arguable appeal which should be heard on merit, and that the respondent will not suffer any prejudice if the orders sought are granted. The Applicant has annexed to his affidavit in support of the application, among others, a copy of the notice of appeal filed on 27<sup>th</sup> August 2018.
5. The application is opposed by the respondent through a

replying affidavit sworn by Harry Onyango Odondi on 23<sup>rd</sup> February 2026. The respondent has averred that, after the applicants failed to file their appeals within the prescribed period, it applied for their notices of appeal to be struck out through an application dated 30<sup>th</sup> April 2024, which is pending hearing before the court. The respondent has averred that its said application was served upon the advocates then on record for the applicants. The respondent has averred that after filing notices of appeal, the applicants went to sleep and did not even apply for certified copies of the proceedings. The respondent has averred that the applicant's application lacks merit.

6. The respondent has averred that the applicant has not demonstrated that he has an arguable appeal, as no draft memorandum of appeal is annexed to the affidavit in support of the application. The respondent has averred that the Applicant has also failed to explain the delay of over 8 years in filing the appeal. The respondent has averred that, apart from blaming its former advocates, the applicant has not demonstrated

that he took any initiative to follow up on the appeal,  
thereby failing to show diligence

on his part. The respondent has urged the court not to come to the aid of the applicant who is guilty of indolence.

7. The application has been argued by way of written submissions. The applicant has filed undated submissions reiterating the contents of his affidavit in support of the application. The applicant has blamed his former advocates' indolence for the delay in the filing of the appeal. The applicant has submitted that it is unfair to blame him for the mistakes of his previous advocates. The applicant has submitted that his intended appeal is arguable. I have not seen the respondent's submissions on record.
8. I have considered the Applicant's application together with the affidavit filed in support thereof. I have also considered the respondent's replying affidavit. Finally, I have considered the Applicant's submissions. The applicant filed a notice of appeal on 27<sup>th</sup> August 2018. The Applicant's record of appeal should have been filed by 27<sup>th</sup> October 2018 under **Rule 84(1)** of the Rules, but it was not. The proviso to the rule, however,

excludes the time certified by the registrar as having  
been required for the

preparation and delivery of copies of the proceedings. As correctly pointed out by the respondent, there is no evidence that the applicant wrote to the Deputy Registrar of the superior court with a copy to the respondent's advocates requesting for certified copies of the proceedings within 30 days of the filing of the notice of appeal. This means that the applicant cannot take advantage of the proviso to **Rule 84(1)** of the Rules. The effect of that is that the Applicant's appeal/record of appeal should have been filed by 27<sup>th</sup> October 2018. By the time the applicant filed the present application dated 10<sup>th</sup> December 2025, there had been a delay of 7 years in filing the appeal.

9. Rule 4 of the Rules gives this Court unfettered discretion to grant an extension of time. That discretion must, however, be exercised judiciously. The applicant had a duty to lay a proper basis for the extension sought. I find the 7-year delay in filing the record of appeal inordinate and unexplained. As correctly pointed out by the respondent, the intended appeal belonged to the Applicant, and as such, he had a duty to

demonstrate that he exercised diligence in the pursuit  
of the intended

appeal, but was let down by his advocates. The applicant cannot get away with merely blaming his former advocates for the delay and arguing that it would be unfair to hold him responsible for it. I agree with the respondent that, while the court would be reluctant to deny a party a right to be heard on account of common mistakes by advocates that occur every day in our courts, a delay of 7 years in filing an appeal is not a common mistake.

10. In the case of **E. T. Monks & Co. Ltd. v. Evans (1985) KLR 584**, it was held that:

***“Public policy demands that the business of the court be conducted with expedition.”***

11. There is no evidence that the applicant exercised diligence in pursuing the intended appeal. The respondent’s contention that the applicant filed the notice of appeal and thereafter went to sleep is not far-fetched. The applicant was woken from his slumber by the respondent’s application to strike out his notice of appeal. I agree with the respondent that this court cannot exercise its discretion in favour of an indolent party.

12. The applicant has also not persuaded me that he has an

arguable appeal. The applicant has not placed before the court the draft grounds of appeal he intends to put forward against the judgment of the superior court. On the issue of prejudice, I agree with the respondent that the prolonged delay in the filing of the appeal is

**in terms of the expenses being incurred in the proceedings.**

**13. The upshot of the foregoing is that the application before me is**  
**Dated and delivered at Nairobi**

**S. OKONG'O**

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

.....  
**JUDGE OF**

**Sign**  
**DEPUTY R**

