



**Owners and Master and Crew of the Motor Tugs “Barbara” and “Steve B” v Owners and Master of the Motor Vessel “Joey” & another (Civil Application E083 of 2024) [2026] KECA 506 (KLR) (13 March 2026) (Ruling)**

Neutral citation: [2026] KECA 506 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E083 OF 2024  
DK MUSINGA, AK MURGOR & J MOHAMMED, JJA  
MARCH 13, 2026**

**BETWEEN**

**THE OWNERS AND MASTER AND CREW OF THE MOTOR TUGS  
“BARBARA” AND “STEVE B” ..... APPLICANT**

**AND**

**THE OWNERS AND MASTER OF THE MOTOR VESSEL  
“JOEY” ..... 1<sup>ST</sup> RESPONDENT**

**THE OWNERS OF THE CARGO LADEN ABOARD MOTOR VESSEL  
“JOEY” ..... 2<sup>ND</sup> RESPONDENT**

*(Being a reference under rule 57 of the Court of Appeal Rules, 2022 from the Ruling of Laibuta, JA. dated 23rd May 2025 for extension of time to file and serve the Notice of Appeal out of time from the Judgment and Decree of the High Court of Kenya at Mombasa (Magare Kizito, J.) delivered on 24th May 2024 in Admiralty Cause No. 2 of 1998)*

**RULING**

1. This is a reference to the full Court under rule 57 of the Rules of this Court from the decision of a single Judge (Laibuta, JA.) delivered on 23<sup>rd</sup> May 2025. In that decision, the learned judge determined a Notice of Motion dated 12<sup>th</sup> July 2024 in which the applicants, being the owners, master and crew of the motor tugs Barbara and Steve B, sought an extension of time under rule 4 of the Rules of this Court to file and serve a notice of appeal out of time from the judgment of the High Court at Mombasa delivered on 24<sup>th</sup> May 2024 in Admiralty Cause No. 2 of 1998.
2. At the time the application that was the subject of the ruling by Laibuta, JA. was filed, both the 1<sup>st</sup> and 2<sup>nd</sup> respondents had already lodged their respective notices of appeal dated 28<sup>th</sup> May 2024 and 4<sup>th</sup> June 2024 respectively. The applicants’ application was intended solely to preserve their right to pursue an



- appeal in their own right, regardless of whether the respondents elected to prosecute their appeals or not.
3. In their application, the applicants argued that, having filed its notice of appeal first, the 1<sup>st</sup> respondent would be deemed the appellant, with the 2<sup>nd</sup> respondent being treated as a respondent in that appeal. They contended that if the 1<sup>st</sup> respondent failed to institute the appeal within the prescribed timelines or at all, they would be left without a remedy as they would be unable, in those circumstances, to lodge a cross-appeal. On that basis, the applicants maintained that it was necessary and in the interests of justice to grant them leave to file their own notice of appeal out of time, and that no prejudice would be suffered by the respondents if the extension is granted.
  4. The 1<sup>st</sup> respondent opposed the application through a replying affidavit, grounds of opposition and written submissions, emphasizing the settled principles governing the exercise of discretion under rule 4, and urged the Court to decline the invitation to extend time. On its part, the 2<sup>nd</sup> respondent contended that by virtue of section 7 of the *Appellate Jurisdiction Act*, jurisdiction to extend time for filing a notice of appeal lay with the High Court rather than this Court, and that rule 4 was therefore ultra vires. The 2<sup>nd</sup> respondent further maintained that the applicants' decision to appeal ought not to be contingent upon the procedural choices made by other parties.
  5. In his ruling, Laibuta, JA. held that the application was fatally defective for want of jurisdiction. The learned judge held that the applicants had not filed any notice of appeal at all, that what was before the Court was merely an undated draft notice of appeal. Relying on the Supreme Court decision of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR cited by this Court in *Apungu Arthur Kibira v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR, the learned judge emphasized that a notice of appeal is a jurisdictional prerequisite which signifies an intention to appeal and is not contingent on any prior event or condition; that in the absence of a notice of appeal there was nothing upon which the Court's discretionary power under rule 4 could be anchored; and that this defect was not a mere technicality curable under Article 159(2)(d) of *the Constitution*, nor could it be salvaged by the overriding objective provisions of the *Appellate Jurisdiction Act*. Consequently, having found that it lacked jurisdiction, the Court dismissed the application without considering the merits of the request for extension of time.
  6. The ruling by Laibuta, JA. precipitated two references under rule 57, one by the applicants, dated 26<sup>th</sup> May 2025 and the other by the 1<sup>st</sup> respondent dated 29<sup>th</sup> May 2025. In their written submissions dated 7<sup>th</sup> July 2025, the applicants reiterate that at the time they filed their Notice of Motion dated 12<sup>th</sup> July 2024, both the 1<sup>st</sup> and 2<sup>nd</sup> respondents had already lodged notices of appeal dated 28<sup>th</sup> May 2024 and 4<sup>th</sup> June 2024 respectively. They contend that, in those circumstances, this Court was already seized of the matter and had the requisite jurisdiction to entertain interlocutory applications arising from the intended appeals. On that footing, they maintain that their failure to file a notice of appeal prior to seeking extension of time did not deprive the Court of jurisdiction as jurisdiction had already crystallised by virtue of the respondents' notices and that their application merely sought to regularize their position within an existing appellate process.
  7. The applicants further contend that they had earlier filed a notice of appeal dated 3<sup>rd</sup> July 2024 which they subsequently withdrew in compliance with the guidance of the Supreme Court in *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR. In that decision, the Supreme Court held that where statutory timelines for the taking of procedural steps have lapsed, a party must first seek extension of time before undertaking the intended step. The applicants submit that their withdrawal of the notice of appeal and subsequent application for extension of time was therefore procedurally proper and in accordance with binding authority.



8. In addition, the applicants place reliance on rule 82(1) of the Rules of this Court, which they contend expressly contemplates situations where multiple parties give notice of appeal from the same decision. The rule provides that second and subsequent notices of appeal are deemed to be notices of address for service rather than substantive notices of appeal. The applicants maintain that this provision demonstrates that the filing of a notice of appeal by every party is not jurisdictional in the strict sense adopted by the learned judge, and that, if leave were granted, any notice filed by them would in any event be deemed a notice of address for service. In their view, an insistence on a prior notice of appeal in the circumstances elevated form over substance.
9. Without prejudice to their jurisdictional argument, the applicants submit that even on the assumption that the settled principles governing the exercise of discretion under rule 4 were applicable, they had fully satisfied those principles. They rely on *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (supra) in which the Supreme Court set out the guiding factors for extension of time, including the explanation for delay, the length of the delay, the absence of prejudice, and the interests of justice. Applying those principles, the applicants contend that they provided a reasonable and sufficient explanation for the delay; that the delay was not inordinate; and that no prejudice would be occasioned to the respondents if time were extended.
10. In conclusion, the applicants urge the full Court to find that the learned single Judge erred in declining jurisdiction; that the Court was properly seized of the matter; and to interfere with the decision under reference in order to give effect to the overriding objective and the interests of justice.
11. In response to the applicants' submissions, the 1<sup>st</sup> respondent supports the learned Judge's reasoning and submits that jurisdiction to extend time under rule 4 can only be invoked by a party who has filed, or at the very least lodged, a notice of appeal. It is contended that the applicants had neither an independent appeal nor a notice of appeal on record and therefore lacked the procedural standing necessary to invoke the Court's discretion. The 1<sup>st</sup> respondent maintains that the respondents' notices of appeal cannot be imputed to the applicants as jurisdiction must be personally invoked and cannot be derived from another party's procedural steps.
12. With respect to the applicants' reliance on *County Executive of Kisumu v County Government of Kisumu & others* (supra), the 1<sup>st</sup> respondent submits that the authority in fact undermines, rather than supports, the applicants' case. It is argued that the Supreme Court in that decision held that while the applicant had filed a notice of appeal within time, it proceeded to file a petition of appeal out of time without first seeking leave, and the Court firmly held that no appeal can be filed out of time without prior leave. In the 1<sup>st</sup> respondent's view, the decision underscores the centrality of a notice of appeal as a jurisdictional foundation and does not stand for the proposition that a party may dispense with filing a notice of appeal altogether when seeking extension of time.
13. The 1<sup>st</sup> respondent further urges the Court to be guided by the settled principles governing references from decisions of a single judge as articulated in *Kimathi & another v Muriuki & 12 others*, Civil Application No. 61 of 2020, [2023] KECA 666 (KLR) (Ruling). In that decision, this Court underscored that a reference is not an appeal, and that interference with a single judge's exercise of discretion is only warranted where it is shown that the judge took into account irrelevant factors, failed to consider relevant factors, misapprehended the law or the facts, or arrived at a plainly wrong decision. The 1<sup>st</sup> respondent maintains that none of these thresholds has been met as the learned judge correctly identified the absence of a notice of appeal as a jurisdictional bar.
14. In conclusion, the 1<sup>st</sup> respondent urges the Court to uphold the ruling of Laibuta, JA. by finding that no error was committed in declining jurisdiction, and to dismiss the applicants' reference.



15. At the hearing of this application, learned counsel Mr. Khanna appeared for the applicants, while the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondents were represented by learned counsel Ms. Akwana and Mr. Kamundi respectively. Both Mr. Khanna and Ms. Akwana made brief oral highlights of their respective clients' written submissions. Mr. Kamundi, who had not filed written submissions, submitted orally that jurisdiction to extend time for filing a notice of appeal from the High Court is vested exclusively in the High Court under the *Appellate Jurisdiction Act* and not in this Court. He submitted that the Rules of this Court on extension of time apply only to procedural steps taken within an already instituted appeal, and that where no notice or record of appeal exists, a party seeking extension must first approach the trial court.
16. We have considered the submissions by the parties and the applicable law. In a reference such as this, a full bench of this Court will only interfere with the exercise of discretion if it becomes apparent that the single judge took into account an irrelevant matter which ought not to have been taken into account, or failed to take into account a relevant matter which ought to have been taken into account, or misapprehended the law applicable or the evidence, or reached a decision that was plainly wrong. See *Simeon Okingo & 4 others v Benta Juma Nyakako* [2021] eKLR; *Hezekiah Michoki v Elizaphan Onyantha Ombongi* [2015] eKLR and *John Koyi Waluke v Moses Masika Wetangula and 2 others* [2010] eKLR.
17. It is settled that jurisdiction is fundamental and that a court must first satisfy itself that it is properly seized of a matter. There is no dispute that the applicants did not file a notice of appeal within the prescribed timelines, evincing their intention to challenge the decision of the High Court, hence their application brought under rule 4.
18. We have perused the impugned ruling and fully agree with the applicants that the learned judge confined himself entirely to the absence of a notice of appeal filed by the applicants and treated that omission as dispositive of the application. In *Nicholas Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, the Supreme Court declared the question of filing of a notice of appeal to be a jurisdictional pre-requisite in the filing of appeals. Similarly, in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR, that court further emphasized that, without a notice of appeal, there cannot be an express intention to appeal. While we fully appreciate the jurisdictional significance of a notice of appeal, the learned Judge, in resting his decision solely on that consideration, appears not to have appreciated the nature of the application before him, to wit, an application seeking extension of time to file and serve a notice of appeal out of time.
19. More significantly, the learned judge did not consider, even in the alternative, whether the application satisfied the settled principles governing the exercise of discretion under rule 4. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (supra), the Supreme Court held that discretion to extend time is unfettered and set out various principles that should be considered in the exercise of discretion, such as:
  - a. 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;
  - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - c. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis;



- d. Whether there is a reasonable reason for the delay which should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- f. Whether the application has been brought without undue delay;
- g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

20. In the same decision, the Supreme Court clarified that where the law prescribes timelines for the taking of procedural steps, a party whose time has lapsed must first seek extension of time before undertaking the intended act. The Court held thus:

“...However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such ‘an appeal’, is tantamount to moving the court to remedy an illegality. This, the court cannot do.

To file an appeal out of time and seek the court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court. It is unfortunate that Petition No 10 of 2014 has been accorded a reference number in this court’s registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No 10 of 2014 having been filed out of time and without leave (an order of this court extending time), is expunged from the court’s record.” [Emphasis added]

21. We are persuaded that the principles enunciated by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* are directly applicable to the applicants’ case. In that regard, we note that the applicants did not seek to sanitize an illegality or to procure the retrospective validation of an appeal filed out of time. Rather, they withdrew their earlier notice of appeal and properly invoked the jurisdiction of the Court by filing an application for extension of time, duly annexing a draft notice of appeal and in strict conformity with the procedural course endorsed by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*. Whether the explanation tendered for the delay was satisfactory, whether the delay was excusable, and whether any prejudice would be occasioned to the respondents were matters lying squarely within the discretionary remit of the learned Judge under rule 4 and called for substantive judicial evaluation.

22. By declining to engage with these considerations, the learned Judge, with respect, failed to properly exercise the discretion vested in him. The outcome was not merely a determination of a jurisdictional objection, but a failure to consider the merits of an application that was properly before the Court and grounded in recognized principles.



- 23. In the circumstances herein, the failure by the learned judge to consider the merits of the application, including the explanation for the delay, the absence of prejudice, and the interests of justice, amounted to a misdirection in principle. That failure falls within the recognized grounds upon which this Court is entitled to interfere with the exercise of discretion by a single judge.
- 24. Before we make dispositive orders in this application, it is necessary that we pronounce ourselves on Mr. Kamundi’s submission that under section 7 of the *Appellate Jurisdiction Act* jurisdiction to extend time for filing a notice of appeal lies with the High Court and not this Court, and that therefore rule 4 of this Court’s Rules is ultra vires the Act. Section 7 of the *Appellate Jurisdiction Act* states as follows:

“Power of High Court to extend time

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”

- 25. The time for giving a notice of appeal is prescribed by rule 77(1) of this Court’s Rules which states as follows:

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- (1) A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.”

- 26. Rule 4 empowers this Court to extend time limited by the Rules of the Court, or by any decision of the Court, or of a superior court, for the doing of any act authorized or required by the Rules, whether before or after doing of the act. It cannot, therefore, be said that this Court has no jurisdiction to extend time for filing or service of a notice of appeal in this Court. Section 7 of the *Appellate Jurisdiction Act* does not grant exclusive power to the High Court to extend time for giving notice of intention to appeal, it merely empowers the High Court to grant such leave, but the provision in no way disentitles this Court from so doing.
- 27. In conclusion, we are satisfied that the learned Judge erred by dealing exclusively with the question of jurisdiction and by declining to consider the merits of the application. The reference is therefore merited and is hereby allowed. The applicants shall file and serve their notice of appeal within fourteen (14) days of the date hereof, and shall thereafter file the record of appeal within thirty (30) days of filing the notice of appeal. The costs of this reference shall abide the outcome of the intended appeal.

**DATED AND DELIVERED AT MOMBASA THIS 13<sup>TH</sup> DAY OF MARCH 2026.**

**D. K. MUSINGA, (PRESIDENT)**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**



**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

