



**Kamuthi Farmers Cooperative Society Ltd v Nairobi City Council  
(Application E004 of 2025) [2025] KESC 28 (KLR) (16 May 2025) (Ruling)**

Neutral citation: [2025] KESC 28 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
APPLICATION E004 OF 2025  
MK KOOME, CJ & P, PM MWILU, DCJ & VP, SC WANJALA, I LENAOLA & W OUKO, SCJJ  
MAY 16, 2025**

**BETWEEN  
KAMUTHI FARMERS COOPERATIVE SOCIETY LTD ..... APPLICANT  
AND  
NAIROBI CITY COUNCIL & 20 OTHERS ..... RESPONDENT**

*(Being an application for extension of time within which to transmit a Notice of Appeal and file the Petition of Appeal against the decision of the Court of Appeal sitting in Nairobi (Musinga, Asike - Makhandia & Kantai JJA) dated 24th January 2025 in Civil Appeal No. E047 of 2021)*

**Delay caused by the Court of Appeal in processing the Notice of Appeal is excusable and justifies extension of time to appeal to the Supreme Court**

*The applicant sought an extension of time to transmit and serve a Notice of Appeal and to file an appeal against a Court of Appeal judgment delivered on January 24, 2025. The delay was attributed to administrative lapses at the Court of Appeal. The Supreme Court found the delay excusable holding that the intended appeal raised arguable constitutional issues, and allowed the application, granting the applicant leave to file the appeal out of time.*

Reported by John Ribia

**Civil Practice and Procedure** – appeals – appeals before the Supreme Court – application for extension of time – whether a delay in transmitting a notice of appeal to the Registrar of the Supreme Court within 14 days that was attributable to the time taken by the Court of Appeal to sign and stamp the Notice of Appeal was excusable and warranted extension of time to file an appeal before the Supreme Court – whether the Supreme Court needed to inquire into the question whether constitutional issues had arisen while it determined an application for extension of time to file an appeal – Supreme Court Rules, 2020 (cap 9B Sub Leg) rules 15, 36, and 37.

**Brief facts**

The applicant filed a Notice of Motion dated February 25, 2025 and lodged on February 27, 2025 seeking an extension of time to transmit and serve its Notice of Appeal and to file an intended appeal before the Supreme Court.



The applicant contended that it had filed ELC Case No. 6898 of 1991 seeking declaratory orders of ownership over two parcels of land measuring 154.5 acres and 21.338 acres respectively, situated within L.R. No. 71/7. The 1st respondent filed a defence and counterclaim in which it sought to compel the transfer of the parcels. The applicant asserted that the counterclaims were statute-barred, having been brought 19 and 30 years after the respective alleged agreements. The Court of Appeal dismissed the applicant's jurisdictional objection.

Following delivery of judgment, the applicant filed a Notice of Appeal on January 27, 2025 but experienced delays in transmitting it to the Registrar of the Supreme Court within the prescribed 14 days. The delay was attributed to the time taken by the Court of Appeal to sign and stamp the Notice of Appeal. The applicant annexed correspondence and an affidavit by a process server to support its claim of due diligence. The 1<sup>st</sup> respondent opposed the application, arguing that the delay was fatal and the intended appeal lacked constitutional issues.

### **Issues**

- i. Whether a delay in transmitting a notice of appeal to the Registrar of the Supreme Court within 14 days that was attributable to the time taken by the Court of Appeal to sign and stamp the Notice of Appeal was excusable and warranted extension of time to file an appeal before the Supreme Court.
- ii. Whether the Supreme Court always needed to inquire into the question whether constitutional issues had arisen while it determined an application for extension of time to file an appeal.

### **Held**

1. Extension of time was not a matter of right but an equitable relief granted to a deserving party who demonstrated diligence and provided a satisfactory explanation for delay. An applicant in such a case must show, inter-alia, that the delay was not inordinate, that it acted promptly upon becoming aware of the lapse, and that no undue prejudice would be occasioned to the respondent if the extension was granted.
2. There was need to present evidence that justified the delay in filing any appeal before the Supreme Court. The delay, though regrettable, was occasioned by circumstances beyond the applicant's direct control.
3. The court did not always need to inquire into the question whether constitutional issues had arisen while it determined an application for extension of time. The substance of the intended appeal would not be a matter before it at that stage-unless the matter was obvious and beyond peradventure. The Supreme Court was prepared to let the determination of the jurisdictional question be raised and determined at the hearing of the appeal.
4. The applicant has demonstrated a reasonable and excusable cause for delay. The application was filed without undue delay once the endorsed Notice of Appeal was obtained, and the respondent would not suffer any prejudice should the extension be granted.

*Application allowed.*

### **Orders**

- i. *The applicant was to transmit its Notice of Appeal afresh to the Registrar of the court within 7 days from the date of the ruling and serve it on the respondents within 3 days of such transmission.*
- ii. *The applicant was granted thirty (30) days from the date of the instant ruling to file its appeal.*
- iii. *The costs of the application would be in the cause.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Attorney General v Small Wonder Limited* Civil Appeal (Application) 110 of 2009; [2011] KECA 192 (KLR) - (Applied)
2. *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* Application 50 of 2014; [2015] KESC 23 (KLR) - (Applied)



3. *Bookpoint Limited v Guardian Bank Limited & Guilders International Bank Limited* Application 4 (E006) of 2021; [2021] KESC 73 (KLR) - (Applied)
4. *Charo, Hassan Nyanje v Khatib Mwasbetani & 3 others* Civil Application 23 of 2014; [2014] KESC 5 (KLR) - (Applied)
5. *County Executive of Kisumu v County Government of Kisumu & 8 others* Civil Application 3 of 2016; [2017] KESC 16 (KLR) - (Applied)
6. *Geo Chem Middle East v Kenya Bureau of Standards* Petition 47 of 2019; [2020] KESC 1 (KLR) - (Applied)
7. *Itolondo v Attorney General & 9 others* Application 3 (E005) of 2021; [2021] KESC 44 (KLR) - (Applied)
8. *Kamuthi Farmers Co-operative Society Ltd v Nairobi City County; Archdioces of Nairobi (Kahawa West Catholic Church) & 18 others (Interested Parties)* Civil Appeal E047 of 2021; [2025] KECA 87 (KLR) - (Mentioned)
9. *Kenya Hotel Properties Limited v Attorney General & 5 others* Application 2 (E004 of 2021) of 2021; [2021] KESC 49 (KLR) - (Applied)
10. *Ngao v Kitbeka* Petition E006 of 2024; [2025] KESC 1 (KLR) - (Applied)
11. *Salat v Independent Electoral and Boundaries Commission & 7 others* Application 16 of 2014; [2014] KESC 12 (KLR) - (Explained)
12. *Salat, Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & 7 others* Civil Appeal 228 of 2013; [2014] KECA 782 (KLR) - (Applied)
13. *Wanga v Republic* Petition E030 of 2023; [2024] KESC 38 (KLR) - (Applied)

#### **Statutes**

##### ***Kenya***

1. Constitution of Kenya articles 162(2)(b);165(5) - (Interpreted)
2. Limitation of Actions Act (cap 22) - (Cited)
3. Supreme Court Rules, 2020 (cap 9B Sub Leg) rules 15, 36(1)(a); 37 - (Interpreted)

#### **Advocates**

*Mr. Paul Mwangi* for for the applicant

*Ms. Muthoni Wanjiku* for for the 1st respondent

### **RULING**

1. Upon perusing the notice of motion dated 25 February 2025 and filed before this court on 27 February 2025, by the applicant seeking orders *inter alia* –
  - a. That this honourable court grants the applicant an extension of time within which;
    - i. to transmit the notice of appeal dated 27 January 2025 filed herein to the Registrar, Supreme Court.
    - ii. to serve the transmitted copy of the notice of appeal upon all parties involved in the Appeal and;
    - iii. to institute an appeal against the judgement of the Court of Appeal delivered on 24 January 2025 in Civil Appeal no E047 of 2021 *Kamuthi Farmers' Cooperative Ltd v Nairobi City Council and Archdiocese of Nairobi (Kahawa West Catholic Church) & 18 others*.
  - b. Costs of the application be provided for.



- c. Any other order that this honourable court may deem fit to grant.
2. Taking into account the affidavits in support of the motion by Benard Kungu Maina, Paul Mwangi & Richard Macharia together with the written submissions dated 25 February 2025 and filed on 27 February 2025 and noting that the applicant, being a cooperative society with over 7000 members, submits that it filed Environment and Land Case no 6898 of 1991 at the Environment and Land Court (ELC) seeking declaratory orders of ownership over two parcels of land measuring 154.5 acres and 21.338 acres respectively, situated within LR no 71/7, itself measuring approximately 415 acres. In response, the 1<sup>st</sup> respondent filed its defence and counterclaim on 6 August 1992 and amended on 9 April 2009 seeking inter-alia orders compelling the applicant to transfer the two portions of land aforesaid to be excised out of LR No 71/7 to the respondents. The applicant contends that the counterclaim was time-barred by the Limitation of Actions Act cap 22 as the claim concerning the 154.5 acres was instituted 19 years after the alleged agreement for its sale while the claim for 21.338 acres was brought 30 years after the agreement in question. It is submitted that the trial court therefore erred in adjudicating the respondents' claims without due regard to their being statute barred. Furthermore, while the Court of Appeal addressed the jurisdiction of the ELC in passing, it is averred that it erroneously dismissed the jurisdictional objection on the ground that it had not been specifically pleaded by the applicant; and
  3. Further noting the fact that the applicant, being aggrieved by the judgment of the Court of Appeal, filed a notice of appeal dated 27 January 2025 but the transmission of the said notice of appeal to the Supreme Court was not made within the 14-day period prescribed by rule 36 of the Supreme Court Rules, 2020. The applicant in that regard attributes the delay to the Court of Appeal, specifically pointing out that the appellate court took long in signing and stamping the notice of appeal. The applicant asserts that it has at all times acted with due diligence and made frantic efforts to transmit the notice as evidenced by its letter dated 11 February 2025 to the Court of Appeal as well as the affidavit by a process server, Richard K Macharia, all in a bid to show the effort it made to obtain a signed and stamped copy of the notice of appeal. These efforts culminated in the receipt of the signed and stamped notice of appeal via email on 19 February 2025 and notably, the endorsed copy of the notice from the Court of Appeal indicating that it was lodged on 17 February 2025. The applicant has further contended that, in its intended appeal before this court, it will make the case that the Court of Appeal violated various provisions of the Constitution by failing to address, in limine, the critical issue of jurisdiction and by failing to satisfy itself as to its own jurisdiction to determine the counterclaims raised by the respondents which were allegedly time- barred. This and other issues, it submits, makes its intended appeal credible and requiring the attention of this court.
  4. In support of its application, the applicant relies on this court's decisions in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR which set the guiding principles in extension of time applications; Dr Wilfrida Arnodah Itolondo v Attorney General & 9 others [2021] eKLR to affirm that the affidavit of the process server, Richard K Macharia, filed in support of the motion, adequately substantiates and validates the explanation for the delay in filing and serving the notice of appeal; Hassan Nyanje Charo v Khatib Mwashetani & 3 others [2014] eKLR and Aviation Allied Workers Union Kenya v Kenya Airways Limited & 3 Others [2015] eKLR where this court recognized that delays caused by administrative processes within the Court of Appeal, such as delays in obtaining certified or signed court documents necessary for an appeal, may constitute reasonable and excusable causes of delay justifying the extension of time. The applicant, in addition, draws support from the Court of Appeal's decision in Attorney General v Small Wonder Limited [2011] eKLR in urging that this court ought to consider the date the Notice was filed ie 27 January



- 2025, to be the operative date, as opposed to the later date of endorsement and lodging by the Registrar on 17 February 2025, which was outside the applicant's control; and
5. Upon considering the 1<sup>st</sup> respondent's replying affidavit sworn by Christine Ireri, Acting County Attorney of the 1<sup>st</sup> respondent, together with the written submissions dated 7 March 2025 and filed on 27 March 2025 wherein the 1<sup>st</sup> respondent contends that the judgment of the Court of Appeal having been delivered on 24 January 2025, the applicant was obligated under rule 36 of the Supreme Court Rules to file and transmit its notice of appeal to the Registrar of this court within fourteen (14) days ie by 7 February 2025. The 1<sup>st</sup> respondent further asserts that the applicant failed to comply with those mandatory timelines, as the notice of appeal was transmitted to the Registrar of this court via email on 19 February 2025, well beyond the 14 days. It is the respondent's other position that the applicant's subsequent filing of this motion constitutes an attempt to retroactively regularise an otherwise defective process. Accordingly, the 1<sup>st</sup> respondent urges the court to find that the application is an abuse of the court process and that the applicant's actions amount to an irregular transmission of the notice of appeal which cannot be sanctified through an extension of time application and resultant orders; and
  6. Further noting the 1<sup>st</sup> respondent's contention that in its amended defence and counterclaim at the trial court, it had sought a declaratory relief affirming its entitlement to 154.5 acres and 21.238 acres to be excised out of LR No 71/7. That the trial court having heard the matter on its merits, delivered its judgment on 4 June 2020 finding that the 1<sup>st</sup> respondent had validly purchased the two parcels of land and had been placed in possession by Kahawa Farmers thereby establishing a constructive trust in favour of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent further asserts that, neither the trial court nor the Court of Appeal engaged in interpretation or application of any constitutional provision in making their decisions and therefore the application is brought in bad faith and aimed to further delay the 1<sup>st</sup> respondent's enjoyment of the fruits of its successful litigation in a matter that has been in court for thirty-four (34) years; and
  7. Further noting that the 1<sup>st</sup> respondent relies on a series of authoritative decisions of this court to oppose the applicant's motion and submits in that regard that this court has previously determined the legal consequences of filing documents out of time, and subsequently seeking extension of time to file them procedurally, and held such conduct to be irregular. Relying on *Kenya Hotel Properties Limited v Attorney General & 5 others* [2021] KESC 49 (KLR) and *Bookpoint Limited v Guardian Bank Limited & Guilders International Bank Limited* (Application 4 (E006) of 2021) KESC 73 (KLR) the 1<sup>st</sup> respondent submits that this court has always emphasized that a notice of appeal is the foundational document for initiating an appeal to the Supreme Court and any application for extension of time is devoid of merit in the absence of a validly filed Notice of Appeal. The 1<sup>st</sup> respondent further draws support from *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] KESC 16 (KLR) where the court held that filing an appeal out of time and without first seeking leave to do so rendered it a nullity and of no legal consequence. Further support is drawn from *Dr Wilfrida Arnodah Itolondo v Attorney General & 9 others* (Application 3 (E005) of 2021) [2021] KESC 44 (KLR), to stress the point that an applicant must justify and validate the delay from the moment he/she becomes aware that the statutory timelines for instituting an appeal and forwarding the notice of appeal had lapsed. In addition, *Wanga v Republic* [2024] KESC 38 (KLR) & *Ngao v Kitheka* (Petition E006 of 2024) [2025] KESC 1 (KLR) is cited to urge the court to find that the intended appeal does not raise any issue of constitutional interpretation and application; and
  8. Upon also considering the applicant's supplementary submissions dated 28 February 2025 filed pursuant to leave granted by the court, wherein the applicant reiterates its earlier arguments and provides specific responses to the 1<sup>st</sup> respondent's submissions as follows; that this court retains



discretionary power to extend time for the transmission of a notice of appeal as provided by rule 15 read with rule 37 of the *Supreme Court Rules* and as was held in *Dr Wilfrida Arnodah Itolondo v Attorney General & 9 others* (*supra*), this court recognizes its inherent jurisdiction to enlarge time where such an extension justified. It is the applicant's other position that a court fees payment receipt from the Court of Appeal confirms that the notice of appeal was filed on 27 January 2025 and within the prescribed 14-day timeline. The delay in transmitting the endorsed notice of appeal, it is argued, was therefore occasioned solely by administrative delay at the Court of Appeal and not by any omission or fault on the part of the applicant. Furthermore, the applicant contends that the filing of a certificate of delay is not a prerequisite to the grant of orders of extension of time under the *Supreme Court Rules*. The applicant has also opined that the issues it has raised in the intended appeal bear clear issues of constitutional interpretation and application and that such issues may be raised at any stage in the proceedings before this court, even if not canvassed before the Court of Appeal. To support this contention, the applicant relies on *Geo Chem Middle East v Kenya Bureau of Standards* (Petition 47 of 2019) [2020] KESC 1 (KLR) in which this Court affirmed that constitutional issues, particularly those concerning jurisdiction may be entertained even where they were not previously raised, provided they are properly framed before the Supreme Court. Finally, the applicant rebuts the respondent's assertion that the intended appeal should be struck out for failure to raise constitutional issues and submits that such an assessment is premature at this stage, a determination previously made by this court in *Nicholas Kiptoo Korir Salat*.

(*supra*); and

9. Bearing in mind that the primary issue before us is whether the applicant has laid a sufficient basis to warrant the exercise of this court's discretion to extend the time for transmission of its notice of appeal to the Registrar pursuant to rule 15 of the *Supreme Court Rules, 2020* as well as orders to file its intended appeal and noting the pleadings filed, submissions made and the authorities submitted;
10. We now opine and determine as follows:
  - i. We reiterate the principles set out in *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR), which are now well settled as being that; extension of time is not a matter of right but an equitable relief granted to a deserving party who demonstrates diligence and provides a satisfactory explanation for delay. An applicant in such a case must show, *inter-alia*, that the delay was not inordinate, that it acted promptly upon becoming aware of the lapse, and that no undue prejudice would be occasioned to the respondent if the extension is granted.
  - ii. In the present case, the applicant filed the notice of appeal on 27 January 2025, within the 14-day period stipulated under rule 36(1)(a) of the *Supreme Court Rules*. However, the endorsed copy of the notice of appeal was only transmitted to the Registrar of this court on 19 February 2025, twelve days outside the prescribed timeframe. The applicant attributes this delay to administrative inefficiencies at the Court of Appeal in stamping and signing the notice of appeal, a fact supported by the affidavit of a process server, Richard K Macharia.
  - iii. In *Dr Wilfrida Arnodah Itolondo v Attorney General & 9 others* (*supra*), we expressed the need to present evidence that justifies the delay in filing any appeal before us. From the affidavits filed, we are persuaded that the delay, though regrettable, was occasioned by circumstances beyond the applicant's direct control. We also take cognizance of this court's prior holdings on this subject particularly in *Aviation Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR where we found that a delay arising from court administration and processes may constitute a reasonable excuse for any delay occasioned. In the present case,



we are satisfied that the delay in contention was caused by the Court of Appeal and not the applicant.

- iv. On whether the intended appeal raises constitutional issues, the applicant submits that the jurisdictional competence of the Court of Appeal in adjudicating the counterclaims is a constitutional question under article 162(2)(b) and article 165(5) of the *Constitution* while the respondents argue that the matter was strictly civil in nature, and no constitutional issue was canvassed in the lower courts. In that regard, in *Aviation Allied Workers Union Kenya (supra)* we held that the court need not always inquire into the question whether constitutional issues have arisen while it determines an application for extension of time. The reason is obvious—the substance of the intended appeal would not be a matter before it at that stage—unless the matter is obvious and beyond peradventure. Without expressing ourselves with finality on the issue therefore and seeing the opposing positions on the issue as well as the circumstances of the case, we are prepared to let the determination of the jurisdictional question be raised and determined at the hearing of the appeal.
- v. We are therefore satisfied that the applicant has demonstrated a reasonable and excusable cause for delay. The application was filed without undue delay once the endorsed notice of appeal was obtained, and we are not persuaded that the respondent will suffer any prejudice should the extension be granted.

11. Consequently and for the reasons afore-stated, we make the following orders:

- i. The applicant’s notice of motion dated 25 February 2025 and filed on 27 March 2025 is hereby allowed as prayed.
- ii. The applicant shall transmit its notice of appeal afresh to the Registrar of this court within 7 days from the date of this ruling and serve it on the respondents within 3 days of such transmission.
- iii. The applicant is granted thirty (30) days from the date of this ruling to file its appeal.
- iv. The costs of the application shall be in the cause.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MAY, 2025.**

.....  
**M.K. KOOME**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**

.....  
**P.M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

.....  
**S.C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....  
**I.LENAOLA**



**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**

**SUPREME COURT OF KENYA**

