



**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA**

*(Coram: Koome; CJ&P, Mwilu; DCJ &VP, Wanjala, Njoki & Lenaola SCJJ)*

**APPLICATION NO. E035 OF 2024**

**-BETWEEN-**

**FUAD MAHMOUD MOHAMED ..... APPLICANT**

**—VERSUS—**

**DIAMOND TRUST BANK KENYA LIMITED .....1<sup>ST</sup> RESPONDENT**

**DIAMOND TRUST INSURANCE AGENCY LIMITED...2<sup>ND</sup> RESPONDENT**

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*(Being an application for extension of time to file an application to review the Ruling and Order of the Court of Appeal at Mombasa (Nyamweya, Lesiit & Odunga, JJA) in Mombasa Court of Appeal Civil App. Sup. No. E001 of 2023 dated 8<sup>th</sup> December, 2023)*

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**Representation:**

Mr. Billy Kongere for the Applicant  
*(Muriu Mungai & Company Advocates LLP)*

Mr. Jackson Kisinga for the 1<sup>st</sup> Respondent  
*(Madhani Advocates LLP)*

No appearance for the 2<sup>nd</sup> Respondent

**RULING OF THE COURT**

**[1] UPON PERUSING** the Notice of Motion application dated 9<sup>th</sup> December, 2024 and filed on 11<sup>th</sup> December, 2024 pursuant to Sections 3, 3A and 21(2) of the Supreme Court Act and Rules 15(2) and 31 of the Supreme Court Rules, seeking extension of time to file an application to review the Court of Appeal's Ruling (*Nyamweya, Lesiit & Odunga JJA*) in *Civil Application Sup. No. E001 of 2023*, declining to grant certification to file an appeal before this Court;

**[2] UPON READING** the applicant's grounds on the face of the application and his supporting affidavit sworn on 9<sup>th</sup> December, 2024 wherein it is contended that: the applicant filed an Originating Motion dated 11<sup>th</sup> January, 2024 seeking to review the Court of Appeal's refusal to certify the matter for a further appeal to the Supreme Court; vide a Ruling delivered on 29<sup>th</sup> November, 2024 the said Originating Motion was struck out for having been filed out of time; and that the applicant, desirous of pursuing an appeal, can only do so upon extension of time by the Honourable Court;

**[3] UPON CONSIDERING** the applicant's averments that: the delay in filing an electronic copy of the Originating Motion was because of the applicant's former counsel's mistaken but honest belief that the Christmas vacation period is excluded from computation of time as is the case in the High Court and the Court of Appeal; the delay of a further six (6) months in lodging hard copies of the Originating Motion was because of the applicant's former counsel's belief that given the shift to exclusive electronic filing in other courts, the Supreme Court too did not require hard copies of the pleadings; the delay is not inordinate; and that the intended application for certification if permitted to be filed has reasonable chances of succeeding and therefore should not be curtailed due to lapses by the applicant's erstwhile legal advisors;

**[4] CONSIDERING** the applicant's further averments that: he was represented by the firm of Gikandi & Company Advocates at the High Court and the Court of Appeal; that after the Court of Appeal delivered its judgment on 14<sup>th</sup> April, 2023 he instructed his counsel to file an appeal to the Supreme Court; he, however, came to learn from the Court of Appeal's Ruling on the application for certification delivered on 8<sup>th</sup> December, 2023 that the advocates had delayed in seeking certification; the Court of Appeal overlooked the error and considered the application on merits and ultimately dismissed it; at the discovery of the oversight, he promptly sought alternative legal representation from the firm of Mwakisha & Company Advocates who filed the Originating Motion dated 11<sup>th</sup> January, 2024 which was struck out by this Court vide a Ruling delivered on 29<sup>th</sup> November, 2024;

**[5] FURTHER NOTING** the applicant's contention that he has now learnt that the firm of Mwakisha & Company Advocates also made similar mistakes by filing the

Originating Motion fifteen (15) days late and the hard copies of the same documents were only filed by his current counsel on record six (6) months after they ought to have been filed; that as a lay person he did not know the legal requirements; he changed advocates whenever it became known to him that his advocates had missed certain steps; that the mistakes of the advocates should not be the basis for locking him out; the delay is not inordinate and is excusable; and the respondents do not stand to suffer any prejudice if the extension of time sought is granted;

**[6] TAKING INTO ACCOUNT** the affidavit of Moses Mwakisha, Advocate sworn on 9<sup>th</sup> December, 2024, who avers that: he received instructions from the applicant on 11<sup>th</sup> December, 2023 to seek a review of the Court of Appeal's Ruling dated 8<sup>th</sup> December, 2023; he required time to peruse the applicant's documents as they were bulky; he was aware of the provision of Rules 7 and 33 of the Supreme Court Rules, however, he wrongly believed that the exclusion of the Christmas vacation from computation of time applies to the Supreme Court, and therefore his honest belief was that he could file the Originating Motion by 17<sup>th</sup> January 2024, which was a mistake in his appreciation of the law; he did not file hard copies of the Originating Motion as he believed that the practice of only filing pleadings electronically cuts across all tiers of the courts; he only learnt of the error on 15<sup>th</sup> July, 2024 once Billy Kongere, Advocate, who had instructions to take over the matter asked him for the stamped copies of the Originating Motion; this was an honest mistake by counsel for which he requests pardon for the applicant to have his day in court to pursue his application for certification; that the respondents have all along known that the applicant is desirous of receiving this Court's input on the specified issues; and that the respondents participated in the application that was struck out, and had no problem with the delay in the filing of the application;

**[7] CONSIDERING** the applicant's submissions dated 9<sup>th</sup> December, 2024 and filed on 11<sup>th</sup> December, 2024 where he cites the Court of Appeal decisions in *Attorney General vs. Law Society of Kenya & Central Organisation of Trade Unions (K)* [2013] KECA 372 (KLR) and *Richard Ncharpi Leiyagu vs. Independent Electoral Boundaries Commission, Ismael Hashimi, Mathew Kipeme Lempurkel* [2013] KECA 282 (KLR); this Court's decision in *County Executive of Kisumu vs. County Government of Kisumu & 8 Application No. E035 of 2024*

*others* [2017] eKLR; *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others*, SC Application No. 16 of 2014; [2014] eKLR (*Nicholas Salat Case*) and *Hassan Nyanje Charo vs. Khatib Mwashetani, Independent Electoral and Boundaries Commission, Juma Musa & Gideon Mwangangi Wambua* [2014] KESC 47 (KLR) and urges that the litigant has been more than zealous in the pursuit of his rights;

**[8] UPON READING** the 1<sup>st</sup> respondent's replying affidavit sworn by Faith Ndonga, its Debt Recovery Officer, on 16<sup>th</sup> January, 2025 and filed on 21<sup>st</sup> January, 2025 wherein she avers that: following the delivery of the judgment by the Court of Appeal on 14<sup>th</sup> April, 2023 the applicant filed a Notice of Appeal dated 24<sup>th</sup> April, 2024 and filed an application for leave to appeal to the Supreme Court on 22<sup>nd</sup> June 2023, two months after the judgment, contrary to Rule 42(b) of the Court of Appeal Rules 2022, with no explanation for the delay; and that the Court of Appeal in the Ruling dated 8<sup>th</sup> December, 2023 dismissed the application, *inter alia*, on this ground, and it did not overlook the delay as averred by the applicant;

**[9] NOTING** the 1<sup>st</sup> respondent's further contention that: the judgment sought to be appealed was delivered on 14<sup>th</sup> April 2023 which is 1 year 8 months and 5 days before the filing of the instant application; the application for extension of time was filed after an inordinate delay which has not been sufficiently explained; the alleged errors of counsel were easily discoverable; that once counsel on record discovered the error on 15<sup>th</sup> July, 2024 they ought to have filed the application for extension of time at that point instead of waiting for this Court to dismiss the application then file the present application; ignorance of the law is no defence; the present application is an afterthought; the applicant has been indolent; the intended application for review of the Court of Appeal Ruling dated 8<sup>th</sup> December, 2023 has no chances of success for reasons that the applicant filed its application for certification before the Court of Appeal out of time hence allowing the instant application will not cure the delay in filing the application before the Court of Appeal; and that the issues raised by the applicant were not of public importance but merely advancing private interests;

**[10] FURTHER CONSIDERING** the 1<sup>st</sup> respondent's averments that it will be severely prejudiced if the application is allowed, by being subjected to escalating advocates' costs on numerous applications filed by the applicant since the judgment was entered; that it had a legitimate expectation that litigation had come to an end noting that the matter commenced in the year 2010, which is now a period of over 14 years. The 1<sup>st</sup> respondent adds that the applicant has filed the following applications since the judgment of the Court of Appeal was delivered: Notice of Motion dated 19<sup>th</sup> June, 2023 seeking certification by the Court of Appeal; Originating Motion dated 11<sup>th</sup> January, 2024 seeking review; Notice of Motion dated 17<sup>th</sup> July, 2024 to amend the application; and the instant application dated 9<sup>th</sup> December, 2024 seeking extension of time. The 1<sup>st</sup> respondent urges that the application is not meritorious, it amounts to an abuse of the court process, the Court ought not to grant the discretionary orders sought and it should be dismissed with costs;

**[11] TAKING INTO ACCOUNT** the 1<sup>st</sup> respondent's submissions dated 16<sup>th</sup> January, 2025 and filed on 21<sup>st</sup> January, 2025 wherein it avers that: the applicant has not met the criteria set out in the *Nicholas Salat Case* for reason that: the Notice of Appeal is defective as it was not transmitted to the Registrar of the Supreme Court pursuant to Rule 36(3) and no proof has been shown that the same was transmitted to this Court. To support this averment, it relies on this Court's decisions in *Bookpoint Limited vs. Guardian Bank Limited & Another* SC App. No. 4 (E006) of 2021 [2021] KESC 73 (KLR), and *Wilfrida Arnodah Itolondo vs. The Attorney General & 9 others* SC. App. No. 3 (E005) of 2021 [2021] eKLR; and that the admission by the applicant's counsel, Mr. Mwakisha, of having failed/neglected to present physical copies of the application to the Court, covers his failure to submit the Notice of Appeal;

**[12]** The 1<sup>st</sup> respondent further relies on the Court of Appeal decision in *Mumo Matemvu vs. Trusted Society of Human Rights Alliance & 5 others* [2013] eLKR where it was held that rules of procedure are the handmaidens of justice and ought not to be ignored; and this Court's decision in *Joseph Sombo & others vs. Nyari Investment (1998) Limited & 5 others* Application No. E048 of 2023 where it was held that the Court of Appeal having dismissed the application for *Application No. E035 of 2024*

certification as it was filed out of time, this Court cannot move to review an application determined to be incompetent for want of procedure;

**[13] CONSIDERING** the applicant's further submissions dated 6<sup>th</sup> February, 2025 and filed on 7<sup>th</sup> February, 2025 as a rejoinder to the 1<sup>st</sup> respondent's submissions wherein he contends that: his Notice of Appeal was filed within time, and that based on the decision in *Amollo vs. Wilson* [2023] KESC 77 (KLR), failure to file or transmit a notice of appeal on a matter of general public importance is not mandatory as it can be filed upon grant of certification; the Court of Appeal determined its application on merit notwithstanding its observation that it had been filed out of time, and therefore the circumstances are not the same as in the case of *Sombo & others vs. Nyari Investments (Supra)*; the applications filed by the applicant are not numerous but were necessary for the applicant to pursue his right to a fair hearing; and that any inconvenience of incurring legal costs can be remedied by an award of costs;

**[14] NOTING** that the 2<sup>nd</sup> respondent, despite service of the application neither filed a response, submissions nor participated in these proceedings;

**[15] BEARING IN MIND** the provisions of Rule 15(2) of the Supreme Court Rules, 2020 which gives this Court jurisdiction to extend the time limited by these Rules or by any decision of the Court;

**[16] WE HAVE CONSIDERED** the application, the affidavit in support, the responses and submissions filed, and **NOW OPINE** as follows:

- (i) This Court set the guiding principles for the grant of extension of time in the *Nicholas Salat Case* as follows: *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; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; whether there will be any prejudice suffered by the respondents if the extension is*

*granted; whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

- (ii) The Court of Appeal delivered its Ruling on the applicant's Notice of Motion seeking certification on 8<sup>th</sup> December, 2023. Pursuant to Rule 33(2) of the Supreme Court Rules 2020, an aggrieved party may apply to the Court for review within fourteen (14) days. The applicant therefore ought to have filed his application on or before 22<sup>nd</sup> December, 2023.
- (iii) The applicant filed the Originating Motion dated 11<sup>th</sup> January, 2024 on the e-filing platform on 17<sup>th</sup> January, 2024 under **Application No. E001 of 2024** and thereafter filed the physical copies on 25<sup>th</sup> July, 2024, which was over six (6) months after the filing of the electronic copy. In our Ruling dated 29<sup>th</sup> November, 2024 while striking out the application for reason that leave was not sought to file the application out of time, we expressly noted that in line with Rule 12 of the Supreme Court Rules 2020, pleadings filed in the Court must be in both printed and electronic form to be considered complete.
- (iv) Applying the principles on extension of time set out in the **Nicholas Salat Case** to the instant application, we note that the reason for delay in complying with the Court's Rules as averred by the applicant is that his former counsel had the honest belief that the exclusion of the Christmas vacation in computation of time applicable in the High Court and the Court of Appeal also applies to the Supreme Court. The applicant further avers that the hard copies of his Originating Motion were not filed as his former advocate believed that the practice of only filing electronically cuts across all tiers of the courts.
- (v) This Court has in several of its decisions, including in **Daniel Kimani Njihia vs. Francis Mwangi Kimani & another**, [2015] eKLR and **Bookpoint Limited vs. Guardian Bank Limited & Guilders International Bank Limited** Application No. 4 (E006) of 2021 [2021] KESC 73 (KLR), held that the only regime of law that governs proceedings before it is the Constitution, the Supreme Court Act, the Supreme Court Rules and any Practice Directions. It is therefore disingenuous for the

applicant's counsel to aver that he had the mistaken belief that the practice in the superior courts below will apply for matters filed before the Supreme Court. It was imperative for the applicant's counsel to acquaint themselves with the Court's Rules before filing any pleadings before the Court.

- (vi) Whereas mistakes of counsel ought not to be visited upon a litigant as we held in ***George Kang'ethe Waruhiu vs. Munene & another*** (Civil Application 18 of 2020) [2021] KESC 42 (KLR); and ***Karinga Gaciani & 11 others vs. Kimanga & another*** (Application E004 of 2023) [2023] KESC 23 (KLR) (***Karinga Gaciani Case***) there must be cogent and credible evidence that the applicant made concerted efforts or due diligence, through evidence or correspondence of the follow up with the advocates to pursue his rights. It is not enough for a party to simply blame the advocates on record for all manner of transgressions. As we held in ***Karinga Gaciani Case***, "*Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not.*" The appellant changed his advocates on more than one occasion with a similar outcome.
- (vii) It is also worth noting that the applicant avers that the errors in lack of compliance with the Rules was discovered in July 2024. However, the application to seek extension was not filed up until this Court made a determination on the Originating Motion in the Ruling of 29<sup>th</sup> November, 2024. It is therefore our holding that the delay in filing the application is inordinate and has not satisfactorily been explained. While it is appreciated that the appellant's advocates might have been culpable, the present application in our view is a knee jerk reaction to our earlier Ruling.
- (viii) On the issue of transmission of the Notice of Appeal, this Court has held in ***Arvind Shah & 7 others vs. Mombasa Bricks & Tiles Ltd & 5 others*** SC Application No. 3 (E008) of 2022 that rule 36 (4) makes it optional to file a notice of appeal either before or after certification in a matter of general public importance, and that even though the Notice of Appeal submitted was not stamped or endorsed by the Court of Appeal, the same is not fatal.

(ix) On the question of costs, this Court in ***Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others***, Sup. Ct. Petition No. 4 of 2012; [2014] eKLR set the principles that guide the grant of costs. Generally, costs follow the event, however, it should not be used to punish the losing party, but to compensate the successful party for the trouble taken in prosecuting or defending a suit. Additionally, the award of costs is discretionary. We note that this matter did not proceed to hearing of the appeal on the merits. Each party shall therefore bear their own costs.

**[17] CONSEQUENTLY**, for reasons aforesaid, we make the following orders:

- (i) The Notice of Motion application dated 9<sup>th</sup> December, 2024 and filed on 11<sup>th</sup> December, 2024 be and is hereby dismissed; and***
- (ii) Each party to bear their own costs.***

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 11<sup>th</sup> day of April, 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**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR,**  
**SUPREME COURT OF KENYA**