



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)

APPLICATION NO. E010 OF 2025

— BETWEEN —

**GOAL ADVISORY AFRICA LIMITED (*Suing as the
Trustee of CYTONN HIGH YIELD FUND (CHYF)*).....APPLICANT**

-AND-

THE OFFICIAL RECEIVER.....RESPONDENT

(Being an application for leave to file a Notice of Appeal and an Appeal out of time from the Ruling of the Court of Appeal (Mumbi Ngugi, Nyamweya & Korir, JJ.A) dated 3rd December, 2024 in Civil Appeal (Applic) No. E590 of 2023 and Civil Appeal (Applic) No. E647 of 2024; and application for leave to file submissions out of time)

Representation:

Mr. Dudi, holding brief for Ms. Koile for the Applicant
(C. Koile & Company Advocates)

Mr. Cyrus Njenga for the Respondent
(The Official Receiver)

RULING OF THE COURT

[1] Before this Court are two related applications. The first is by Goal Advisory Africa Limited (the applicant), seeking leave to file both a Notice of Appeal and an

Appeal out of time. The second is by the Official Receiver (the respondent), who seeks leave to file submissions in response to that application. Given the interconnected nature of these applications, the Court has found it prudent to consider them together and render a composite ruling.

[2] UPON CONSIDERING the Notice of Motion by the applicant dated 7th April 2025 and filed on 10th April 2025 brought pursuant to Section 3A of the Supreme Court Act, Cap 9B and Rules 15(2) and 32 of the Supreme Court Rules 2020 for orders that this Court be pleased to: grant leave to the applicant to file its Notice of Appeal, Petition and Record of Appeal out of time against *the Ruling of the Court of Appeal (Mumbi Ngugi, Nyamweya & Korir JJ.A) dated 3rd December, 2024 in Civil Appeal (Applic) No. E590 of 2023*; that pending the hearing and determination of this application, execution of the Orders dated 3rd December 2024 be stayed; that the *status quo ante* the orders of 3rd December 2024 be maintained; and that costs of the application be in the cause; and

[3] UPON READING the affidavit sworn on 7th April 2025 by Nelson Ng'ang'a, Director of the applicant, together with the submissions of even date, wherein it is averred that: the applicant had sought the review of the impugned orders before the Court of Appeal; that on 6th March 2025 the Court of Appeal dismissed the application prompting the immediate institution of the present application; that the applicant acted without delay, and no prejudice will be occasioned to the respondent should the application be allowed; on the contrary, a refusal to extend time would cause irreparable harm and possibly the collapse of the applicant's business; and that the intended appeal raises weighty legal questions, particularly regarding the proper exercise of discretion under Rule 5(2)(b) of the Court of Appeal Rules and the right to be heard under Articles 25(c) and 50 of the Constitution; and

[4] FURTHER, the applicant submits that the stay and *status quo* orders are essential to preserving the subject properties and preventing irreparable harm

before the appeal is determined; that, in the absence of such orders, the properties may deteriorate or be unlawfully interfered with, disrupting the contractual rights and debt ranking structure critical to the appeal, thereby rendering it nugatory. The applicant, for these reasons, prays that the application be allowed; and

[5] UPON CONSIDERING the Notice of Motion by the respondent dated 12th May 2025 and filed on 16th May 2025 erroneously purported to be brought pursuant to Section 3C of the Supreme Court Act, Cap 9B and Rules 15(1)(c) and 15(2) of the Supreme Court Rules 2020 for orders that this Court be pleased to: *extend time within which the respondent may file its response and written submissions to the applicant's Notice of Motion; and that the Official Receiver's Replying Affidavit and submissions in response to the applicant's Motion annexed to the application, be deemed as properly filed: and the costs of this application be provided for; and*

[6] UPON REVIEWING the affidavit sworn on 12th May 2025 by Mark Gakuru, the Official Receiver, to the effect that: the High Court (*Mabeya, J.*) placed Cytonn High Yields Solutions LLP (CHYS) and Cytonn Real Estate Project Notes LLP (CPN) under liquidation, issued preservation orders, and appointed the Official Receiver as liquidator; that the liquidation process commenced immediately but was complicated by numerous suits both in the High Court and Court of Appeal; that in March and April 2025, the respondent dealt with several consolidated appeals involving CHYS and CPN, which were eventually heard on 30th April 2025; that he was unable to file a response and submissions in time due to the heavy workload, strict timelines at the Court of Appeal, and the requirement to respond within 7 days of the applicant's filing; that despite best efforts, the submissions were not filed; that a request for extension of time made on 30th April 2025 before the Deputy Registrar was declined; and that the present application has been filed without undue delay and will not prejudice any party; and

[7] **NOTING** the Replying Affidavit sworn on 20th May 2025 by Nelson Ng'ang'a, Director of the applicant, and the accompanying submissions opposing the respondent's application, to the effect that: the reasons advanced for the delay are not persuasive and without merit; the applicant faced similar constraints and court deadlines but complied fully and in time; that the respondent's explanation falls short of the standard required for extension of time under Rules 15(2) and 32 of the Supreme Court Rules and the principles enunciated in ***Salat Vs Independent Electoral and Boundaries Commission & 7 others*** (Application No. 16 of 2014) KESC 12 (KLR) (the ***Salat Case***); that the Official Receiver has exhibited a consistent pattern of non-compliance with timelines before both the Court of Appeal and this Court, which should not be condoned; and that the delay continues to prejudice the applicant and over 25,000 investors whose financial interests are at risk due to prolonged litigation; and

[8] **COGNIZANT** of the Deputy Registrar's directions of 30th April 2025, declining to issue an extension of time to the respondent to file its responses and submissions on account of the matter having been certified as urgent, and bearing in mind the applications, affidavits, and rival arguments by both parties, **WE NOW THEREFORE OPINE** as follows:

- i. By Rule 15(2) of the Supreme Court Rules 2020, this Court is clothed with unfettered jurisdiction to extend timelines set either by the Rules themselves or laid by the Court.
- ii. The guiding principles for the exercise of this discretion were articulated in the ***Salat Case*** (*supra*). These principles, include: that extension of time is an equitable relief granted at the Court's discretion and assessed on a case-by-case basis; that the applicant must offer a credible and adequate justification for the delay; that the explanation provided must be both reasonable and persuasive; that granting the extension should not result in undue prejudice to the opposing party; that the application for extension of

time must itself be brought promptly; and, where relevant, that public interest may be a factor in the Court's determination.

- iii. Applying these principles to the instant case, and for good order, we begin with the second application by the respondent.
- iv. It is common factor that the respondent failed to file both a replying affidavit and submissions within the timelines prescribed by the directions of the Deputy Registrar of the Court and, as a consequence, the Deputy Registrar declined its request for extension of time on the ground that the matter had been certified urgent hence time was of the essence.
- v. The respondent was aggrieved by those directions. The respondent has brought the instant Motion for leave to extend time within which to file its response and written submissions. A party aggrieved by any decision of the Registrar has recourse to Section 11(1) of the Supreme Court Act, which provides that;

“A person aggrieved by a decision of the Registrar made in accordance with the rules may apply to a judge of the Supreme Court for a review of such decision.”

- vi. The respondent ought to have moved a single judge in chambers pursuant to this section to consider a review of the Deputy Registrar's order. Having so failed, the respondent cannot file a Notice of Motion under Rule 15(2) of the Supreme Court Rules, more so belatedly at this stage in the proceedings, after the bench to hear the matter has already been empaneled.
- vii. Moreover, one of the prayers of the respondent is *“that the Official Receiver's Replying Affidavit and submissions in response to the applicant's Motion annexed to the application, be deemed as properly filed”*. In ***County Executive of Kisumu Vs County Government of Kisumu & 8 others*** [2017] KESC 16 (KLR), this Court cautioned that a document filed out of time without leave of the Court is irregularly on the record and cannot be accepted or adopted by the Court even if the

application was to be found to be meritorious. The correct procedure is to first seek an extension of time before proceeding to file responses and submissions. For these reasons, we are inclined to disallow the respondent's application for extension of time.

- viii. Concerning the applicant's Motion seeking leave to file a Notice of Appeal and Petition, we note that the impugned decision, which the applicant intends to challenge on appeal to this Court concerns interlocutory orders issued by the Court of Appeal preserving the *status quo* of the subject matter of the dispute, in the exercise of its discretion under Rule 5(2)(b) of the Court of Appeal Rules.
- ix. Ordinarily, this Court does not entertain an appeal from a ruling emanating from the Court of Appeal's exercise of its discretion under Rule 5(2)(b) since the substantive appeal at the Court of Appeal would still be pending. See ***Teachers Service Commission Vs Kenya National Union of Teachers & 3 others*** [2015] KESC 29 (KLR). Furthermore, the appeal, from which the interlocutory ruling emanated, was heard by the Court of Appeal and judgment reserved for 17th October 2025.
- x. Having found that we cannot, in the circumstances of this case, entertain an appeal challenging the exercise of discretion by the Court of Appeal under Rule 5(2)(b), we find no need to determine the merit of this application. For these reasons, we equally dismiss this application in its entirety.
- xi. On the issue of costs, bearing in mind that costs follow the event as enunciated in ***Rai & 3 others Vs Rai & 4 others*** [2014] KESC 31 (KLR), we order parties to bear the costs of their respective applications.

[9] ACCORDINGLY, we make the following ORDERS:

- i) ***The Applicant's Notice of Motion dated 7th April 2025 be and is hereby dismissed.***

- ii) The Respondent's Notice of Motion dated 12th May 2025 be and is hereby dismissed.**
- iii) The parties shall bear the costs of their applications.**

It is so ordered.

DATED and DELIVERED at NAIROBI this 15th Day of August 2025.

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M.K. IBRAHIM
JUSTICE 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

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA