



## REPUBLIC OF KENYA

### IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Ibrahim, Njoki, Lenaola & Ouko, SCJJ)

**APPLICATION NO. E036 OF 2024**

— BETWEEN —

**BOARD OF MANAGEMENT  
BUNI PRIMARY SCHOOL .....APPLICANT**

-AND-

**FREEDOM LIMITED.....1<sup>ST</sup> RESPONDENT  
DIRECTOR OF SURVEY.....2<sup>ND</sup> RESPONDENT  
CHIEF LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT  
MINISTRY OF EDUCATION.....4<sup>TH</sup> RESPONDENT  
OMAR AWADH MBARAK..... 5<sup>TH</sup> 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 (Murgor, Laibuta & Odunga, JJ.A) dated 11<sup>th</sup> October, 2024 in Civil Appeal (Applic) No. E028 of 2022)*

---

Representation:

Mr. Githinji Mwangi for the Applicant  
(JMK Advocates LLP)

Non-appearance by the 1<sup>st</sup> to 4<sup>th</sup> Respondents

Mr. G.N. Gakuo for the 5<sup>th</sup> Respondent  
(Muturi Gakuo & Kibara Advocates)

### **RULING OF THE COURT**

**[1] UPON CONSIDERING** the Notice of Motion by the Board of Management, Buni Primary School, (the Applicant) dated 19<sup>th</sup> December 2024 and filed on 1<sup>st</sup>

April 2025 brought pursuant to Sections 3A, 15A and 24 (*erroneously cited*) of the Supreme Court Act, Cap 9B and Rule 32 of the Supreme Court Rules 2020 for orders that this Court be pleased to; *grant leave to the applicant to file and serve the Notice of Appeal in respect of the Ruling in Civil Appeal No. Eo28 of 2022 out of time; extend time for filing the Petition of Appeal against the decision of the Court of Appeal in Civil Appeal No. Eo28 of 2022; and that the costs of this application be provided for; and*

**[2] UPON READING** the affidavit in support of the Motion sworn on 19<sup>th</sup> December 2024 by Robert Vura Matsungu, the Chairperson of the applicant; and the applicant's submissions dated 12<sup>th</sup> March 2025 to the effect that: by a judgment of 23<sup>rd</sup> February 2024, the Court of Appeal nullified the title of Freedom Limited (the 1<sup>st</sup> respondent) in respect of Plot 1948/V/MN (Original No. 412/10) (the suit property), ordered vacant possession, and directed eviction of the 1<sup>st</sup> respondent; the applicant, having received a 3.5 acre donation from the 1<sup>st</sup> respondent, was aggrieved by the impact of the judgment on its beneficial interest in the suit property and filed an application for joinder, review, and stay of execution of the said judgment; the application was dismissed by the Court of Appeal on 11<sup>th</sup> October 2024 by a majority decision (*Odunga, JA dissenting*), prompting the applicant's intention to appeal to this Court; the applicant avers that upon delivery of the impugned ruling, its advocate advised them on the legal implications of the judgment and the ruling on Buni Primary School and its learners; the applicant resolved to appeal to the Supreme Court. However, due to technical downtime with the e-filing system, the Notice of Appeal was filed two days outside the 14-day timeline set by the Supreme Court Rules, 2020; that the delay was neither deliberate nor prolonged and that the instant Motion has been filed without undue delay; and

**[3] FURTHER**, it is the applicant's conviction that the intended appeal raises arguable issues of law, including the question whether the Court of Appeal correctly applied the finality principle, the doctrine of *functus officio*, and whether

its decision violated the applicant's right to a fair hearing under Article 50 of the Constitution. Moreover, the applicant submits that no prejudice will be occasioned to the respondents should time be enlarged, and that the principles for extension of time as set out in *Salat Vs Independent Electoral and Boundaries Commission & 7 others* (Application No. 16 of 2014) KESC 12 (KLR) have been satisfied. Accordingly, the applicant prays that the Motion be allowed in the interests of justice and public interest; and

**[4] UPON CONSIDERING** the replying affidavit sworn on 3<sup>rd</sup> April 2025 by Omar Awadh Mbarak, the 5<sup>th</sup> respondent, and his submissions of even date opposing the Motion, the combined effect of which is that the applicant has improperly sought joinder in an already concluded appeal; that the impugned ruling bears no consequence on the education or proprietary land interest of Buni Primary School; that the applicant's delay in filing the Notice of Appeal is inordinate, inexcusable, and indicative of indolence; and that granting the Motion would occasion immense prejudice to the 5<sup>th</sup> respondent. It is further submitted that the intended appeal is devoid of any arguable legal issues, as the Court of Appeal rightly dismissed the application for stay, joinder, and review. The 5<sup>th</sup> respondent considers the Motion superfluous and a misuse of judicial time, noting that he remains ready and willing to donate 4 acres to the applicant on humanitarian grounds in alignment with the dissenting view of *Odunga, JA*. Finally, he argues that the Motion fails the public interest threshold as established in *Steyn Vs Ruscone* [2013] KESC 11 (KLR), and does not meet the criteria for extension of time to appeal out of time; and

**[5] UPON READING**, the applicant's further affidavit sworn on 9<sup>th</sup> April 2024 by Robert Vura Matsungu, in response to the respondent's replying affidavit, where after reiterating the averments in his earlier affidavit, states that the applicant acted diligently; that the 5<sup>th</sup> respondent has not demonstrated tangible prejudice and that if the impugned ruling remains unchallenged, the school will be forced to accept a donation of land tainted by fraud which not only risks

invalidation but also renders the gift potentially unusable for any meaningful development or benefit to the school; and that it is in public interest that the school be given a fair opportunity to present the evidence and safeguard its proprietary interest; and

**[6] HAVING CONSIDERED** the application, affidavits and rival arguments by both parties, **WE NOW THEREFORE OPINE** as follows:

- i) Under Rule 15(2) of the Supreme Court Rules, 2020, the Court is vested with the jurisdiction to extend time prescribed either by the Rules themselves or by an order of the Court.
- ii) The principles governing the exercise of this discretion were set out in ***Salat Vs Independent Electoral and Boundaries Commission & 7 others*** (*supra*), and include: that extension of time is an equitable remedy granted at the Court's discretion on a case-by-case basis; that the applicant bears the burden of establishing a satisfactory basis for the delay; that any explanation for the delay must be reasonable and convincing; that no undue prejudice should be occasioned to the respondent if the extension is granted; that the application must be made without unreasonable delay; and that, in appropriate cases, public interest considerations may also guide the Court's decision.
- iii) Before applying these principles to the instant case, we note that the impugned judgment (***Civil Appeal No. E028 of 2022***), which the applicant sought review before the Court of Appeal, and which culminated in the ruling that is the subject of the intended appeal, is the subject of ***SC Petition No. E009 of 2024***. That appeal was heard before us on 20<sup>th</sup> May 2025 and is pending judgment. In essence, the appeal will determine the proprietorship of the suit property.
- iv) While, according to the applicant, they only found out about the case after the judgment of the Court of Appeal, we entertain serious doubts that it was not aware of the appeal filed by the 1<sup>st</sup> respondent against the 5<sup>th</sup> respondent

before this Court in ***SC Petition No. E009 of 2024***. No purpose would be served by this application at this stage after the horse has bolted.

- v) This procedural infraction notwithstanding, even if the merit of this Motion were to be considered, we would come to the conclusion that the applicant does not deserve the relief of extension of time, as the test in ***Salat Vs Independent Electoral and Boundaries Commission & 7 others (supra)*** has not been met. For example, the applicant has not demonstrated that indeed there was technical downtime with the Judiciary's e-filing system. Without any documentary evidence such as an email, a letter, or any form of communication concerning the alleged downtime, we cannot accept the explanation. Moreover, in view of the stage this dispute has reached, it would be highly prejudicial to the respondents if time were to be extended.
- vi) Whatever the applicant's grievance, we hold, it cannot override the interest of the primary or principal parties before the Court, in this instance, the 1<sup>st</sup> and 5<sup>th</sup> respondents. See ***Murutetu & another Vs Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae)*** (Petition 15 & 16 of 2015 (Consolidated)) [2016] KESC 12 (KLR).
- vii) For these reasons, we find no substance in this Motion and dismiss it in its entirety.
- viii) As costs are discretionary and follow the event, in exercise of our discretion, we direct each party to bear its own costs.

**[7] ACCORDINGLY**, we make the following **ORDERS**:

- i) The Applicant's Notice of Motion dated 19<sup>th</sup> December 2024, be and is hereby dismissed.***
- ii) Each party shall bear its own costs.***

It is so ordered.

**DATED and DELIVERED at NAIROBI this 15<sup>th</sup> Day of August, 2025.**

.....  
**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE PRESIDENT**  
**OF THE SUPREME COURT**

.....  
**M.K. IBRAHIM**  
**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**

