REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & VP, Wanjala, Lenaola, Ouko & Warsame SCJJ)

APPLICATION NO. E026 OF 2025

—BETWEEN—

ISAAC RUGA MWAMBURA... APPLICANT

-AND-

NATIONAL BANK OF KENYA LTD...............................1ST RESPONDENT

P. K KIBERIA..2ND RESPONDENT

MARGRET NJENGA T/A CHESTEM ENTERPRISES....3RD RESPONDENT

(Being an application for extension of time to file and serve a Notice of Appeal against the Judgment of the Court of Appeal (Waki, Nambuye & Kiage JJ. A) dated 18th October, 2017 in Civil Appeal No. 230 of 2011)

Representation:

Mr. Kongere Tom for the Applicants

(*Prof. Kongere & Company Advocates*)

Mr. Komonjo Kiburi for the 1st Respondent and 3rd Respondent
(*Komonjo Kiburi & Co. Advocates*)

RULING OF THE COURT

[1] UPON PERUSING the Notice of Motion Application dated 30th July 2025 and filed on 2nd September 2025 by the Applicant under Section 3A of the Supreme Court Act and Rule 15 of the Supreme Court Rules 2020 seeking orders that –

1. *This Honourable Court be pleased to grant the applicant leave to file a Notice of Appeal out of time against the decision of the Court of Appeal in the Judgement delivered on 18th October, 2017 in Nakuru Civil Appeal No. 230 of 2011;*
2. *This Honourable Court be pleased to grant the applicant leave to file an appeal out of time against the decision of the Court of Appeal in the Judgement delivered on 18th October, 2017 in Nakuru Civil Appeal No. 230 of 2011;*
3. *Costs of and incidental to this application abide the result of the said appeal.*

[2] UPON CONSIDERING the affidavit in support of the Motion sworn by Isaac Ruga Mwambura, the applicant herein, together with the written submissions both dated 30th July 2025 and filed in this Court on 2nd September 2025, wherein the applicant avers that the delay in filing the application was occasioned by inadvertent mistake of his previous firm of Advocates, Kiplenge & Kurgat Advocates; that upon the Court of Appeal delivering its judgment, he immediately expressed to his advocates his dissatisfaction with the same and his intention to appeal to this Court, but they failed to file a Notice of Appeal within the prescribed timelines or even advise him of the legal implication of failing to do so; that as a result of the failures of his advocates he remained unaware of the legal requirement to file the Notice within the prescribed timelines and therefore failed to file the Notice of Appeal in time; that during the intervening period his wife fell critically ill and all his time and finances were directed substantially towards the treatment and recovery of his spouse, impeding his ability and capacity to pursue his intended appeal against the judgment of the Court of Appeal; that upon recovery of his wife he inadvertently attempted to pursue alternative remedies, such as engaging the DCI, this Court through a non-litigious petition, the County Commissioner, the Regional Commissioner, the Judiciary, and the Central Bank of Kenya from the year 2020 to 2022, based on an erroneous belief occasioned by lack of proper legal advice that he had no further right of appeal to this Court; that the advent of COVID and the consequent nationwide lockdown and restrictions of movements and operations during the material time did not help his pursuance of his intended appeal; and that the explanations he has given for the delay in filing the Notice and the substantive appeal within the prescribed timelines are plausible; and

[3] UPON CONSIDERING the applicant's further averments that his intended appeal is meritorious and has a good chance of success since the same seeks to challenge the failure of the Court of Appeal to order that the suit property be reverted to him despite finding that the sale was fraudulent, illegal, and contrary to Article 40 of the Constitution; that the award of damages of Kshs. 300,000 was not sufficient to remedy and compensate him for violation of his right to property occasioned by the illegal and fraudulent sale of his property; that his intended appeal is as of right under Article 163(4)(a) of the Constitution since it involves the interpretation and application of the Constitution, particularly the right to property and fair administrative action under Articles 40 and 47 of the Constitution respectively; that the respondents shall not suffer any prejudice if the Court grants him leave to file the intended appeal; and that he is apprehensive that, unless the Court grants him leave to appeal, he shall suffer great prejudice and irreparable damage; and

[4] TAKING INTO ACCOUNT the 1st and 3rd respondents' Grounds of Opposition dated 30th April, 2026 and filed in this Court on 6th May 2026, that there has been a delay of about 9 years in making this application, which is inordinately long and without plausible explanation; that there has not been demonstrated any intention to appeal by asking for proceedings from the Court of Appeal or instructions to the advocate to appeal to this Court; that the issues raised in the Court of Appeal do not guarantee an automatic appeal to this Court; that no leave to appeal or certification has been sought from the Court of Appeal to confirm that the matter deserves to be brought to this Court due to its public importance nature; that the dispute in the Court of Appeal is not of general importance but of private interest to property; that the explanations given for the delay in filing the Notice of Appeal are lame and not credible; that since the delivery of the judgment of the Court of Appeal om 18th October 2017, the applicant has filed two applications in the Court of Appeal both of which have been dismissed with costs to the 1st respondent, which the applicant has not settled; and that it is against public policy and the interest of justice to revive matters that were closed and finalized 9 years ago; and

[5] FURTHER TAKING INTO ACCOUNT the replying affidavit sworn by Chrispus N. Maithya the 1st respondent's head of Commercial and Transactions Litigation, on 5th May, 2026 and filed on 6th May, 2026, and the written submissions of even date opposing the Motion wherein the respondents aver that, this matter commenced way back in 1982 when the applicant borrowed Kshs. 488, 000 from the 1st respondent but failed to settle the same; that the 1st respondent sued for recovery in ***Nakuru HCC. No. 59 of 1994*** but failed to make any recoveries; that in 2001 the 1st respondent reactivated the recovery process through the exercise of the statutory power of sale which succeeded and the applicant's property known as Nyandarua/Kahura/290 was sold to the 2nd respondent through a public auction conducted by the 3rd respondent on 3rd May, 2002; that aggrieved the applicant filed a suit ***Nakuru HCC. 270 of 2002*** which was dismissed on 15th April, 2011 by Maraga J (as he then was); that the applicant appealed against the dismissal of his case in the Court of Appeal, that vide a judgment delivered on 18th October, 2002 Court of Appeal partly allowed the appeal and granted the appellant Kshs. 300,000 as general damages occasioned by the irregular auction of the suit property; that the

1st respondent paid the damages on 7th December, 2017 and finalized the matter; that the appellant went silent until February, 2023 when he filed an application in the Court of Appeal seeking review of the judgement; that the application was on 14th June, 2023 dismissed for want of prosecution; that party-to-party costs were taxed at Kshs. 181,580 which costs the applicant has refused to pay pleading poverty; that the applicant once again brought an application seeking reinstatement of his dismissed application and stay of execution of the costs awarded to the 1st respondent; that the 1st respondent filed a preliminary objection based on the ground that Kariuki & Co. Advocate who purported to act for the applicant was not an advocate and thus was engaging in criminal conduct by drawing pleadings and purporting to represent the applicant; that the Preliminary objection was upheld and the application struck out vide a ruling dated 21st June, 2024 with costs to the 1st respondent which were later taxed at Kshs. 78, 150 on 30th January, 2025; that all this time the applicant had not mentioned any intentions to appeal to this court and therefore this application is an afterthought;

[6] NOTING the respondent's submissions that the application does not meet the test set out by this Court in the case of ***Nicholas Kiptoo Arap Korir Salat Vs the Independent Electoral and Boundaries Commission & 7 Others*** [2014] KESC 12 (KLR)**;** that one cannot be heard to blame his advocate as he is required to show diligence in pursuit of his case as was held in the case of ***Gaciani & 11 others Vs Kimanga & another*** [2023] KESC 23 (KLR); that the applicant's wife's sickness is not a reasonable excuse for a delay of 9 years; that the applicant own admission that he attempted to seek help from other government agencies and only remember to pursue audience of this court through this application is an afterthought; that COVID-19 pandemic cannot be blamed for action of omission done in 2017 three years before it struck; that the 1st and 3rd respondent have not enjoyed closure that comes with finalization of cases since 2002 when the matter was instituted and therefore they will suffer great prejudice if this matter is allowed to linger any longer in the corridors of justice; and that the applicant and his fake advocate have refused to pay the costs awarded against them by the Court of appeal; and

[7] APPRECIATING that this Court is clothed with unfettered discretion under Rule 15(2) of the Supreme Court Rules to extend the time for filing any document; and that the principles that govern the exercise of such discretion as delineated in the case of ***Nicholas Kiptoo Arap Korir Salat vs the Independent Electoral and Boundaries Commission & 7 Others (supra)*** are as follows:

1. *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;*
2. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
3. *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*
4. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
5. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
6. *Whether the application has been brought without undue delay; and*
7. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

[8] WE NOW OPINE as follows:

i. The Court of Appeal's judgment, which is the subject of the applicant's intended appeal, was delivered on 18th October, 2017 while the instant application was filed on 2nd September 2025, more than eight years (8) after the expiry of the fourteen-day statutory window required for one to file a Notice of Appeal. In our view, a delay of more than eight years is definitely inordinate.

ii. Having established that the delay is inordinate, the next issue is whether the applicant has given a plausible explanation to our satisfaction to warrant an extension of time for him to lodge the notice of appeal and his intended appeal. The applicant in his explanation has given four reasons for the delay. First, he claims that the delay was occasioned by an inadvertent mistake by his previous firm of Advocates, Kiplenge & Kurgat Advocates who failed to file the Notice of Appeal within the prescribed timelines despite expressing to them his dissatisfaction with the Judgment of the Court of Appeal and his intention to appeal to this Court. Second, he claims that the delay was equally occasioned by the sickness of his wife which impeded his ability and capacity to pursue his intended appeal. Third, he claims that upon recovery of his wife he inadvertently attempted to pursue alternative remedies, such as engaging the DCI, the Judiciary through a non-litigious petition, the County Commissioner, the Regional Commissioner, and the Central Bank of Kenya from the year 2020 to 2022, based on an erroneous belief occasioned by lack of proper legal advice that he had no further right of appeal to this Court. Fourth, he claims that the advent of COVID and the consequent lockdown and restrictions of movements and operations nationwide during the material time did not help his pursuance of his intended appeal.

iii. Having considered the above reasons advanced by the applicant to explain the more than eight years' delay, we do not find them persuasive enough to warrant an extension of time to file his notice of appeal and the intended appeal. First and foremost, it is trite law that a party to suit bears the greatest responsibility in the conduct and outcome of his case and cannot at any time shift blame to his counsel, more so where there is no credible evidence on the failure on the part of counsel. In the case of ***Mohamed Vs Diamond Trust Bank Kenya Limited & another*** (Application E035 of 2024) [2025] KESC 17 (KLR), we observed as follows:

"Whereas mistakes of counsel ought not to be visited upon a litigant, 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 was not enough for a party to simply blame the advocates on record for all manner of transgressions."

iv. A review of the supporting affidavit shows that the applicant has not attached any evidence of instructions allegedly given to Kiplenge & Kurgat Advocates, former advocates, to lodge an appeal against the judgment of the Court of Appeal. This deficiency, when considered alongside his reliance on the illness of his wife, further weakens his case. While the Court sympathizes with her condition, the applicant's subsequent pursuit of remedies before institutions such as the DCI, the County Commissioner, the Regional Commissioner, the Judiciary, and the Central Bank of Kenya demonstrates that this application was not a priority and is in fact an afterthought. That impression is reinforced by his attempt to review the Court of Appeal judgment through an unqualified representative, which was dismissed with costs against both himself and the said representative.

v. The reliance on COVID-19 restrictions is equally unconvincing. The judgment sought to be appealed against had been delivered three years earlier, and even after the lifting of restrictions, the applicant continued to pursue other avenues of redress before belatedly turning to this Court.

vi. The 1st and 3rd respondents have equally raised a critical issue which this Court cannot overlook: jurisdiction of this court to hear and determine this application. From the facts summarized hereinabove, it is evident that the matter originated from an ordinary civil suit and was determined as such by the courts below. The dispute before both the trial court and the Court of Appeal was confined to whether there had been an improper exercise of the statutory power of sale over land parcel Nyandarua/Kahuru/290, which was sold to the 2nd respondent. The Court of Appeal, having found in favor of the applicant to a limited extent, awarded him damages of Kshs. 300,000. At no point did the parties raise any issues concerning the interpretation or application of the Constitution, a position taken and explained by the 1st and 3rd respondents without a satisfactory answer by the applicant. When assessed collectively, these circumstances show that to allow any extension of time without the issue of Jurisdiction being addressed would only take the Court on an expedition of no useful purpose. Although the applicant alleges violations of his proprietary rights under Article 40 and his right to fair administrative action under Article 47, the record shows that no constitutional interpretation or application was undertaken by the courts below.

vii. For these reasons, we find that the applicant is not deserving of the remedy of extension of time and dismiss this application in its entirety.

viii. 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 that the applicant shall bear the costs of this application.

[9] CONSEQUENTLY, we make the following Orders:

i. ***The Notice of Motion dated 30th July, 2025 and filed on 2nd September, 2025 be and is hereby dismissed.***

ii. ***The applicant shall bear the costs of this application.***

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **25th** day of **September**, 2026.

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

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S.C. WANJALA
JUSTICE OF THE SUPREME COURT

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I. LENAOLA
JUSTICE OF THE SUPREME COURT

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W. OUKO
JUSTICE OF THE SUPREME COURT

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M. WARSAME
JUSTICE OF THE SUPREME COURT