REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. E046 OF 2025

— BETWEEN —

CHRISANTUS JUMA WAFULA.....APPLICANT

-AND-

WILLIAM WAMALWA WEKUNDA.....1ST RESPONDENT
DONALD OKUMU SIKUNYILI.....2ND RESPONDENT
BEN SIMIYU WAFULA.....3RD RESPONDENT

(Being an application for extension of time and leave to file and serve the petition of appeal out of time)

Representation:

The Applicant acting in person

Chengasia Murunga & Company Advocates for the 1st and 2nd Respondents

Omundi Bw'onchiri Advocates for the 3rd Respondent

RULING OF THE COURT

[1] UPON PERUSING the Notice of Motion dated 10th November 2025 and filed on 23rd April 2026, pursuant to Article 159(2)(d) of the Constitution and Rules 26, 31, 38 & 40 of the Supreme Court Rules 2020, seeking the following orders:

a) *Leave to serve the petition and supporting documents upon the respondents by substituted service including electronic services;*
b) *Extension of time within which to serve the Petition;*

c) *Deeming the Petition filed on 26th October 2025, SCPT/E046/2025 as duly filed and properly on record;*
d) *Leave to regularize the Petition record, including correction of the index and missing pages as per the Supreme Court Rules;*
e) *Additional time to pay the balance of filing fees/security deposit;*
f) *That the petition shall not be struck out on account of procedural lapses, under Article 159(2) of the Constitution;*
g) *Costs of the application be in the cause*; and

[2] UPON CONSIDERING the applicant's grounds on the face of the application and affidavit sworn in support by *Chrisantus Juma Wafula*, the applicant (acting in person) on 10th November 2025, wherein it is contended that SC Petition No. E046 of 2025 was filed on 26th October 2025 pursuant to Article 163(4)(a) of the Constitution, challenging the order of the Court of Appeal *(Makhandia, Omondi & Kimaru, JJ.A)* made on 17th September 2025 in Kisumu Civil Application No. E078 of 2024; that he paid Kshs. 6,000/- as security of costs; that upon presenting the original bundles to the Supreme Court Registry on 31st October 2025, the same were declined for non-compliance with Rules 26(2) and 40(4) of the Supreme Court Rules 2020, and he subsequently discovered minor errors, including missing pages and incorrect indexing; that he thereafter sought, by letter dated 3rd November 2025, leave to regularize the record and avoid the petition being struck out on procedural technicalities, citing financial constraints and the fact that he is acting in person while awaiting *pro bono* assistance from the Law Society of Kenya, the National Legal Aid Service and Kituo Cha Sheria; that the foregoing circumstances have occasioned delay in service upon the respondents; and that, in the interests of substantive justice and pursuant to Article 159(2)(d) of the Constitution, he seeks leave to regularize the record, settle the outstanding filing fees within 30 days, have the petition deemed duly filed on 26th October 2025, and proceed with service upon the respondents; and

[3] UPON EXAMINING the applicant's submissions dated 24th November 2025 and 15th May 2026 respectively, both filed on 24th June 2026, urging in addition to the above averments, that the application meets guidelines set out in ***Salat Vs Independent Electoral and Boundaries Commission & 7 others*** [2014] KESC 12 (KLR) on extension of time; that this Court in ***Aramat & another Vs Lempaka & 3 others*** [2014] KESC 21 (KLR) affirmed that procedural defects should not override substantive justice; that Rules 4 and 59 of the Supreme Court Rules 2020 allows this Court to issue appropriate directions concerning fees; that the applicant has properly invoked this Court's jurisdiction under Article 163(4)(a) of the Constitution; and

[4] UPON ASSESSMENT of the 1st and 2nd respondents' Notice of Preliminary Objection and submissions all dated 20th May 2026 and filed on 5th June 2026 to the effect that the instant application and the entire petition are incompetent by dint of Article 163(4)(a) & (b) and (5) of the Constitution; that this Court in ***Nduttu & 6000 others Vs Kenya Breweries Ltd & another*** [2012] KESC 9 (KLR) clarified the two distinct categories of appeals that may properly lie from the Court of Appeal to the Supreme Court; that in ***Joho & another Vs Shahbal & 2 others*** [2014] KESC 34 (KLR), this Court declared that for jurisdiction under Article 163(4)(a) of the Constitution to arise, the appeal must raise a question of constitutional interpretation or application that was canvassed before the superior courts and progressed through the ordinary appellate mechanism to this Court; and

[5] BEARING IN MIND the 3rd respondent's Notice of Preliminary Objection, replying affidavit sworn by *Ben Simiyu Wafula* and the 3rd respondent's submissions all dated 8th May 2026 and filed on 8th June 2026, contending that the appeal is incompetent for want of jurisdiction under Article 163(4) of the Constitution, as it neither raises a question of constitutional interpretation or application nor was certification sought from the Court of Appeal prior to lodging the appeal; and

[6] UPON NOTING that the applicant's appeal arises from an interlocutory order of the Court of Appeal in which the court noted that the applicant had filed an omnibus application seeking, among other reliefs, leave to appeal out of time, which leave had already been granted by a single Judge. The appellate court consequently explained this fact to the applicant, who indicated that he wished to withdraw the application. There being no objection by the respondents, the court marked the application as withdrawn; and

[7] UPON BEING SATISFIED that it is this order that precipitated the appeal and the present application before us, in which the applicant seeks, *inter alia*, leave to regularize the petition and an extension of time within which to serve the respondents; and

[8] COGNISANT OF THE FACT that this Court has already established the guiding principles for extension of time in ***Salat*** *(supra),* to the effect that:

a) *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;*
b) *A party seeking extension of time has the burden of laying a basis to the satisfaction of the court;*
c) *Whether the court should exercise the discretion to extend time is a consideration to be made on a case-to-case basis;*
d) *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
e) *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
f) *Whether the application has been brought without undue delay; and*
g) *Whether in certain cases, like election petitions, public interest should be a consideration for extending time; and*

[9] UPON BEING GUIDED by our reasoning and determination in ***Nduttu*** *(supra)* on the exercise of jurisdiction of the Court and where we explained that:

"28. The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an Appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a) (emphasis ours). If an appeal is challenged at a preliminary level on grounds that it does not meet the threshold in article 163(4) (a), the Court must determine that challenge before deciding whether to entertain the substantive appeal or not. But the Court need not wait for a preliminary objection before applying the test of admissibility in article 163(4)(a). It is the Court's duty as the ultimate custodian of the Constitution to satisfy itself that the intended appeal meets the constitutional threshold."

[10] WE NOW OPINE as follows:

i. The jurisdiction of this Court to entertain an appeal from the Court of Appeal is circumscribed by Article 163(4) of the Constitution. Under Article 163(4)(a), an appeal lies as of right only where it involves the interpretation or application of the Constitution. The constitutional question must have been one that was substantively before the superior courts and upon which they based their decisions.

ii. In the present matter, the order challenged by the applicant was interlocutory in nature and arose from the withdrawal of an omnibus application after the Court of Appeal determined that its principal prayer had been overtaken by events. Nothing on the record demonstrates that

the Court of Appeal was called upon to or did indeed interpret or apply any provision of the Constitution, or that the order in question turned upon the determination of a constitutional question.

iii. Applying the principles enunciated in ***Nduttu*** *(supra)*, we consequently find that the present appeal does not meet the jurisdictional threshold prescribed by Article 163(4)(a) of the Constitution.

iv. Having so found, we find no purpose in considering whether the applicant has satisfied the principles governing extension of time as set out in ***Salat*** *(supra)*. This Court cannot properly exercise its discretion on extension of time where the very appeal in respect of which that discretion is sought falls outside its jurisdictional radar. The application must therefore fail at the threshold as we sustain the objections raised by the respondents.

[11] CONSEQUENTLY, and for reasons aforesaid, we make the following **ORDERS**:

a) The Notice of Motion dated 10th November 2025 and filed on 23rd April 2026 is hereby dismissed.

b) The Petition dated 24th October 2025 and filed on 26th October 2025 is hereby struck out.

c) Each party shall bear its own costs.

d) We hereby direct that the sum of Kshs. 6,000 deposited as security for costs upon lodging of this appeal be refunded to the applicant.

It is so Ordered.

DATED and **DELIVERED** at **NAIROBI** this **30th** Day of **October 2026.**

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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

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

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA