



Republic v Chiloba & another; Katiba Institute & 5 others (Exparte) (Judicial Review Application E041 of 2023) [2024] KEHC 14670 (KLR) (Judicial Review) (30 September 2024) (Ruling)

Neutral citation: [2024] KEHC 14670 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E041 OF 2023
JM CHIGITI, J
SEPTEMBER 30, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

**EZRA CHILOBA, DIRECTOR GENERAL, COMMUNICATIONS AUTHORITY
OF KENYA 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

AND

KATIBA INSTITUTE EXPARTE

LAW SOCIETY OF KENYA EXPARTE

KENYA UNION OF JOURNALISTS EXPARTE

KENYA EDITORS GUILD EXPARTE

KENYA CORRESPONDENTS ASSOCIATION EXPARTE

BLOGGERS ASSOCIATION OF KENYA EXPARTE

RULING

1. The application that is before this code for determination is the one updated the 21st day of December 2023 wherein the applicant seeks orders that;
 1. 1...spent.
 2. This Honorable Court be pleased to grant leave to the Respondent to file and serve a Notice of Appeal out of time pursuant to the provisions of Section 7 of the [Appellate Jurisdiction Act](#).



3. This Honorable court be pleased to extend time for filing the appeal against the decision of the Court rendered in Judicial Review Application No.041 of 2023.
4. Costs of this application be provided for.

The Applicant's case;

2. On 19th October, 2023, this Honourable Court delivered a Judgment in which it:
 - a. Declared the provisions of Rule 19(1)(a)(b)(c)(d) of the Kenya Information and Communications(Broadcasting) Regulations, 2009 unconstitutional,;
 - b. Annulled the Programming Code made pursuant to Section 46H of the *Kenya Information and Communications Act*; and
 - c. Quashed the Authority's decision of 22nd March, 2023 which censured 6 TV stations.
3. On the same date the Respondent's Advocates on record communicated the said Judgement to the Respondent and its impact on the Authority's mandate to oversight broadcasting service providers in Kenya.
4. Further to the above, on the same date the Judgment was delivered, the Authority's erstwhile Director General resigned from office which affected the activities of the Authority including issuance of approvals/instructions and the flow of information to and from the Authority External Counsel.
5. The changes at the management level within the Authority occasioned a delay in transmission of instructions to the Advocates to lodge a Notice of Appeal against the impugned Judgment.
6. The instructions were subsequently issued to the Authority's Advocates to lodge an application for extension of time in view of the fact that the time for lodging a Notice of Appeal had lapsed.
7. Subsequently, on 21st December, 2023, the Respondent lodged with this Court the instant Application for leave to file a notice of appeal out of time
8. It is its case that the position of the law on applications for leave to appeal out time has crystallized through a long line of judicial authorities in this country. For instance, the Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat Versus Independent Electoral and Boundaries Commission & others (2014) eKLR set out the guiding principles upon which a court exercising discretion to extend time should be guided. Under the case, the following conditions must be met in order for a court to grant leave to appeal out of time, namely:
 - 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 who seeks for 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.
9. In applications of this nature, the first consideration that a court makes is whether an applicant has tendered a satisfactory explanation for the delay in filing the appeal.
10. The period for lodging an appeal lapsed on 2nd November, 2023. The period of delay is 49 days.
11. The reason for the delay in filing the Notice of Appeal is satisfactory based on the change of management at the Authority which occasioned a delay in convening the Authority's Board meeting to discuss the Judgment and issuance of instructions to the Authority's Advocates.
12. Reliance is placed in the Court of Appeal case of Multi Media University of Kenya v Kenya Union of Entertainment and Music Industry Employees [2019] eKLR where the Court in allowing an application for leave where the delay in lodging the appeal was occasioned by lack of an authorized person to issue instructions held as follows:
- “The other reason advanced was that the Vice Chancellor of the University was not available when the order was issued and he is the only authorized person who could give instructions on the matter. I find the reasons advanced by the applicant reasonable....”
13. It is the Applicant's case that another guiding principle to a court dealing with a matter of this nature is whether a respondent will suffer prejudice if the application is allowed.
14. It is its case that it is an established principle in matters of this nature that a party who stands to suffer prejudice due to an application for leave to appeal out of time, should demonstrate such prejudice by way of evidence.
15. It relies in the case of Multi Media University of Kenya v Kenya Union of Entertainment and Music Industry Employees (Supra) where the Court held as follows:
- “As aforementioned, the respondent did not file any replying affidavit to demonstrate whether it will suffer any prejudice...”
16. The Exparte Applicant, responded to the instant Application by way of Grounds of Opposition dated 24th January, 2024 wherein the Respondent did not demonstrate any prejudice that it will suffer if the application is allowed.
17. It argues that no prejudice will be suffered by the Exparte Applicants for the reason that proceedings were filed in public interest and touch on interpretation of the Authority's powers under Regulation 19(1)(a)(b)(c)(d) of the Kenya Information and Communications (Broadcasting) Regulations, 2009 vis-à-vis the implication of the said Regulation 19 on the freedom of expression under Article 33 of *the Constitution*.
18. It is the Authority and indeed the consumers of broadcasting services who stand to suffer prejudice if the Application is not allowed for the reason that the orders declaring Regulation 19(1)(a)(b)(c) and (d) of the Kenya Information and Communications (Broadcasting) Regulations, 2009 as unconstitutional severely impacts the Authority's powers to regulate the broadcasting industry.
19. It is its case that the instant matter raises various issues which transcend the personal interests of any of the parties to the Petition and indeed impacted by the Judgment and in particular; the declaration of unconstitutionality on Regulation 19(1)(a)(b)(c)(d) of the Kenya Information and Communications



(Broadcasting) Regulations, 2009, the Authority’s mandate to regulate the broadcasting industry has been severely hampered leading to the detriment of the public.

20. The Applicant argues that the intended appeal raises public interest issues as follows:
- a. The constitutionality of the Authority’s mandate to regulate the broadcasting industry under Regulation 19 of the Kenya Information and Communications (Broadcasting) Regulations, 2009
 - b. The impact of Regulation 19 on the freedom of expression under Article 33 of *the Constitution*; and
 - c. The impact of the declaration of Regulation 19 of the Kenya Information and Communications (Broadcasting) Regulations, 2009 as unconstitutional on the regulation of the broadcasting industry in Kenya.
21. It argues that the intended appeal raises triable issues and as a consequence, the Respondent should be given an opportunity to canvass the same through the grant of the instant Application. The intended appeal will also present an opportunity for the Court of Appeal to settle with finality the issues in controversy.

The Respondent’s case;

22. The Respondent opposes the application vehemently. It relies heavily in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & Others [2014] eKLR where the Supreme Court set out guiding principles for courts exercising the discretion to extend time:
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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents, if 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.
23. It is its case that the Applicant is not entirely candid about the cause of the delay since on one hand, the Applicant claims that “changes at the management level within the Authority occasioned a delay in transmission of instructions to the Advocates to lodge a Notice of Appeal”. But at the same time CA claims that the judgment rendered on 19th October 2023 was not uploaded online and so CA’s counsel “had to collect a copy physically from the court on 30th October 2023”. Worse, CA does not disclose when it finally instructed counsel to pursue an appeal.
24. It is the Respondents case that the Applicant has not discharged the burden of satisfactorily declaring and explaining the whole period of delay to the Court.



25. Extension of time is an equitable remedy involving the exercise of judicial discretion and equity. Equity aids the vigilant and not the indolent. Equity cannot aid a party like CA which has been indolent.

Analysis and Determination

26. The court has to decide whether the applicant has tendered a satisfactory explanation for the delay in filing the appeal and whether it is entitled to the orders sought or not.
27. The Authority' Director General resigned from the Authority 19th October, 2023 which coincided with the day The Judgment was delivered.
28. The changes that the management level of the Authority occasioned a delay in the transmission of instructions to the Authority's Advocates to lodge a Notice of Appeal against the Judgement of this Honourable Court.
29. By the time the Authority' Board sat, deliberated upon the impact of the Judgment and issued instructions, the timelines for lodging an appeal had lapsed.
30. The Authority's Advocates only obtained a copy of the Judgment on 30th October, 2023 and rendered an advisory to the Authority on its impact on the regulation of the broadcasting industry.
31. The period for the delay in lodging an appeal lapsed on 2nd November, 2023.
32. In order to exercise my discretion in deciding whether or not to enlarge time, I am off the view that the reason advanced by the applicant are reasonable. Either their management changed or that the applicant took long to secure instructions because of the resignation of the CEO.
33. It is my finding that 49 days' delay is not fatal, and the court is minded of promoting access to justice by allowing the application and that Article 48 of *the constitution*
34. The respondent on its part has not persuaded this court that it will suffer prejudice if their application is allowed.
35. In allowing the application, I am guided by the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & Others [2014] eKLR where the Supreme Court set out guiding principles for courts exercising the discretion to extend time:
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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents, if 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.



Disposition:

36. The application has merit, and the same is allowed.

Order:

The application is allowed as prayed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2024.

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J. M. CHIGITI (SC)

JUDGE

