



**Oyugi & another v Independent Electoral & Boundaries Commission & 3 others (Election
Petition Appeal E008 of 2023) [2023] KEHC 18385 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18385 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
ELECTION PETITION APPEAL E008 OF 2023**

WA OKWANY, J

MAY 31, 2023

BETWEEN

ROSE NYAMOITA OYUGI 1ST APPELLANT

ELIZABETH KWAMBOKA ORANGO 2ND APPELLANT

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT**

UNITED PROGRESSIVE ALLIANCE 2ND RESPONDENT

EDNAH MORAA OBARA 3RD RESPONDENT

ELIJAH ABERE 4TH RESPONDENT

RULING

1. On 23rd February 2023, the Lower Court rendered its verdict on the Election Petition No. E003 of 2022. Aggrieved by the said decision, Appellants herein filed the instant appeal on 2nd March 2023. The Appellants thereafter filed the Record of Appeal and the Supplementary Record of Appeal on 6th April 2023 and 5th May 2023 respectively.
2. The Appellants/Applicants also filed an Application dated 7th May 2023 which is the subject of this ruling. They seek the following orders in the said application: -
 - a. Spent
 - b. That the time for the filing of the Record of Appeal and Supplementary Record of Appeal be extended.



- c. That the Record of Appeal dated and filed 6th April 2023 and the Supplementary Record of Appeal dated 3rd May 2023 and filed on 5th May 2023 be deemed as duly and properly filed.
 - d. That the Honourable Court be pleased and give directions as to depositing of security for costs as provided under Section 78 of the [Elections Act](#).
 - e. Costs of the Application be borne by the Respondents.
 - f. Such further Orders be made as the Court may deem fit and expedient.
3. The Application is brought under Order 42 Rule 2 of the Civil Procedure Rules, Section 79G and 3A of the [Civil Procedure Act](#), Section 78 of the [Elections Act](#), Rule 19 and 34(6) of the Election (Parliamentary and County) Petitions Rules, and Article 159(2) (d) of [the Constitution](#) of Kenya.
 4. The application is supported by the 1st Applicants Affidavit and is premised on the following grounds: -
 - i. The Applicants being aggrieved and dissatisfied with the judgment of Hon. Nyigei (PM) dated 23rd February 2023 lodged an appeal against the judgment vide a Memorandum of Appeal dated 1st March 2023.
 - ii. The Applicants contend that their Record of Appeal was subsequently filed on 6th April 2023 through their advocates, after the lapse of 21 days of filing the Memorandum of Appeal as provided under Rule 34 (6) Election (Parliamentary and County) Petition Rules.
 - iii. That the Applicants filed their Supplementary Record of Appeal on 5th May 2023.
 - iv. The Applicants further contend that the delay in filing the Record of Appeal was not deliberate but inadvertent as they were unable to obtain the proceedings and a certified copy of the Decree in time.
 - v. The Applicants have since prepared a Record of Appeal and a Supplementary Record of Appeal which contains the said certified copy of the Decree with other crucial documents including the 4th Respondent's submissions, the 4th Respondent's list of authorities, the Petitioner's written submissions and UPA Elections and Nomination Rules which formed part of the proceedings in the trial court.
 - vi. The Applicants pray that the Honourable Court extends the time for filing of the Record of Appeal and the Supplementary Record of Appeal and that the same be deemed as duly and properly filed.
 - vii. That this Honourable Court has powers under Rule 19 of the Election (Parliamentary and County) Petition Rules, 2017 to extend time within which an act can be done.
 - viii. That the Applicants had already paid the deposit of Kshs. 100,000/= as provided under Section 78 (2) (c).
 - ix. That the Applicants have been unable to get an invoice for security of costs for the Appeal.
 - x. The Applicants contend that the instant Application has been filed timeously and in good faith.
 - xi. The Applicants further contend that no prejudice will be occasioned on the Respondents if the Application is allowed.
 - xii. It is in the interest of justice that the Application herein is granted Ex-Debito-Justitiae.



5. The 1st Respondent opposed the Application through the Grounds of Opposition dated 17th May 2023 wherein it listed the following grounds: -
 1. The Application offends the laid out elements ascribed by Section 34 of the Elections Parliamentary & County Elections Petition Rules, 2017.
 2. The Application offends the elements of Law as laid down in the Supreme Court of Kenya decision in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR.
 3. The Supplementary Record of Appeal as filed is improper before this Honourable Court as it is not provided for under the Election Parliamentary & County Election Petition Rules 2017.
 4. The Record of Appeal was filed way out of the prescribed timelines without a plausible explanation.
 5. There is no correspondence or annexures in the applicant's application evidencing that there was delay occasioned in getting the typed proceedings from the subordinate Court.
 6. There is no Certificate of Delay attached on Record of appeal or purported Supplementary Record of Appeal from the Subordinate Court exonerating the applicant from the delay in filing on time.
 7. There has been no evidence presented before this Honourable Court regarding Security of Costs paid beforehand if at all.
 8. Based on the above position it is clear that the Applicant has contravened Rule 34 (6) of the Election Parliamentary and County Petition Rules 2017.
 9. The Application dated 7th May, 2023, is therefore frivolous, vexatious, lacks merit, is incurably defective and deserving dismissal in the first instance.
 10. The Application is a clear attempt at circumventing the law in favour of the applicant and it is in the interests of justice and fairness that the instant application be dismissed with costs to the 1st Respondent.
6. Parties canvassed the Application by way of written submissions.

The Applicants' Submissions

7. The Applicants' submissions addressed the following issues: -
 - i. Whether the Court has the discretion to admit the Record of Appeal and Supplementary Record of Appeal dated 6th April 2023 and 3rd May 2023 respectively out of time.
 - ii. Whether the failure to deposit security for costs renders the Appeal incompetent.
 - iii. Whether the prayers sought ought to be granted as prayed.
8. On the court's discretion to admit the Record of Appeal out of time, Mr. Ochoki, learned counsel for the Applicants submitted that filing the Record of Appeal and Supplementary Record of Appeal out of time was not fatal to the intended Appeal. It was submitted that the omission of the 4th Respondent, as an intended party, for the purposes of service was merely a typographical error which did not affect the prayers for extension of time. It was submitted that the Appellants had demonstrated that they



were unable to file the Record of Appeal for reasons beyond their control and that the Respondents did not demonstrate that they will suffer any prejudice if the Application is allowed.

9. The Applicants relied on Rule 19 (1) of the Election (Parliamentary and County) Petitions Rules 2017 (hereinafter “the Petition Election Rules”) which permits the Court to exercise its discretion in allowing such applications, in the interests of justice. Reference was made to the decisions in *Lorna Chemutai & 4 Others vs. IEBC & 2 Others* (2018) eKLR, *John Munuve Mati vs. Returning Officer Mwingi North Constituency & 2 Others* (2018) eKLR and *Mawathe Julius Musili vs. Independent Electoral & Boundaries Commission & Another* (2018) eKLR where it was held that late filing of the Record of Appeal is not fatal to the appeal as that court has the discretion to allow the same out of time. Counsel noted that the courts, in the above cited cases were of the view that justice should be administered without undue regard to procedural technicalities.
10. Regarding the issue of deposit of security for costs, the Applicants submitted that failure to deposit security for costs did not render the appeal incompetent because it is not provided for in law. The Applicants observed that Section 78 (1) of the Election Petition Rules is silent on the issue of deposit of security. They urged the Court to weigh the parties competing interests and arrive at the correct verdict.
11. The Applicants maintained that they are willing to abide by any conditions that the court may impose in respect to security for costs. They referred to the decision in *Lorna Chemutai & 4 Others vs. IEBC & 2 Others* (supra), *Odongo Victor Robert vs. Independent Electoral and Boundaries Commission & 2 Others* (2018) eKLR and *Lydia Mathia vs. Naisula Lesuuda & Another* (2013) eKLR where the courts held that Section 78 of the *Elections Act* applied only to election petitions filed in the High Court and Magistrates’ Courts but not appeals arising from the decision of those courts. It was further argued that the deposit for security for costs was solely confined to election petitions filed in an Election Court.

The 1st Respondent’s Submissions

12. Mr. Gatheru, learned counsel for the 1st Respondent submitted that the Application does not meet the threshold for the granting of leave to file the Record of Appeal as the Applicants did not offer any plausible explanation for the delay in filing the Record of Appeal so as to enable the Court to exercise its discretion in their favour. For this argument the 1st Respondent cited the decision in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR where the court outlined the principles that a court should consider in exercising its discretion to extend time. Counsel observed that Section 34(6) of the Election Petition Rules, which provides for the timelines to be observed in filing pleading in election petition appeals, is couched in mandatory terms.
13. The 1st Respondent submitted that it will suffer prejudice if the application is allowed as the Applicants had not demonstrated that they are capable of compensating it in costs should the appeal be unsuccessful. It was submitted that a cursory glance at the Memorandum of Appeal reveals that the appeal is not arguable and is therefore unlikely to succeed.
14. It was further submitted that the Respondents have already settled in their respective elective positions and are working towards fulfilling their mandate to the electorate. The 1st respondent contended that it is trite that non-compliance with the Election Petition Rules and Regulations is detrimental to the Application. Reference was made to the case of *Kitavi Sammy vs. IEBC & 2 Others*, 2018 eKLR where the court held that failure to serve the Memorandum of Appeal within the stipulated time was fatal to the Appeal.



The 2nd and 3rd Respondents' Submissions

15. Mr. Nyamweya, learned counsel for the 2nd and 3rd Respondents observed that the Applicants did not bother to inform the court of when they requested for the trial court's proceedings so as to enable the court to compute the time that the Applicants took to prepare the Record of Appeal. Counsel noted that the Applicants are guilty of material non-disclosure and that a party seeking equitable remedy ought to make full disclosure. They also faulted the Applicants for relying on the provisions of Order 42 (3) and section 79 (G) and 3A of the [Civil Procedure Act](#) and Rules, yet Election Petitions were governed by the [Elections Act](#) and Rules.
16. The Respondents noted that the delay in filing the Record of Appeal was not explained and that the laws governing the timelines in Election Petitions are couched in mandatory terms. They urged this court to uphold the strict timelines provided for in election petitions.

The 4th Respondent's Submissions

17. Mr. Mwendani, learned counsel for the 4th Respondent, submitted that the Appeal herein, as against the 4th Respondent, offends the provisions of Rule 35 (3) of the Election Petition Rules having been filed out of time. Counsel further noted that neither the 4th Respondent nor his counsel were included in the Appeal for purposes of service thus occasioning them prejudice as they remained unaware of the Appeal until 16th April 2023. The Respondent argued that his late inclusion in the appeal was an afterthought.
18. It was submitted that the Lower Court proceedings and judgment were certified in good time and that the move by the Applicants to file the Record of Appeal out of time amounted to an abuse of the court process thus divesting the court of the jurisdiction to exercise its discretion in the Applicants' favour.
19. Counsel further submitted that non-compliance with the substantive Rules governing the appeal cannot be cured by invoking the Court's discretion under Article 159 (2) (c) of [the Constitution](#). It was submitted that without proof of payment of security for costs under Rule 34 (4) and Section 78 of the [Elections Act](#), the Applicants' assertions that they tried to deposit security was futile.
20. It was the 4th Respondent's case that the Applicants flouted Rule 34 (6) of the Elections (Parliamentary and Country) Elections Petition Rules when they failed to lodge the Record of Appeal within 21 days after filing the Memorandum of Appeal and further failed to provide reasons for the delay. For this argument, the 4th Respondent cited the decision in Gilbert Mwangi Njuguna vs. Judicial Service Commission and Another (2020) eKLR, where the court held that filing an appeal out of time and then seeking an extension is tantamount to moving the court to remedy an illegality. Reference was also made to Nicholas Kiptoo Korir Arap Salat case (supra) where it was held a party ought to seek an extension of time before proceeding to do that which the law requires.
21. It was submitted that the critical factors to be considered in the exercise of the discretion to extend time had not been proved and that the Applicants could not benefit from the provisions of Rule 19 of the Election Petition Rules. Reference was made to the case of Mark Oyugi Kasera vs. Jubilee Jumbo Hardware Ltd & Another (2016) eKLR where the court held that a party seeking the exercise of the court's discretion ought to provide it with sufficient material in that regard.



Analysis and Determination

22. I have carefully considered the pleadings filed herein and the parties' respective submissions. The main issue for determination is whether the Applicants have made out a case for the granting of the orders to extend the time for filing the Record of Appeal.

Jurisdiction of the Court and Timelines

23. Section 75 of the *Elections Act* grants the High Court the appellate jurisdiction in election petitions arising from the Magistrate's Court in respect of the position of Member of the County Assembly. The said section provides as follows: -

(1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.

....

(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be—

- (a) filed within thirty days of the decision of the Magistrate's Court; and
- (b) heard and determined within six months from the date of filing of the appeal.

24. This jurisdiction granted to the High Court is to be exercised in accordance with the principle of expeditious determination of election petitions that is envisioned by *the Constitution* under Article 87 which stipulates as follows: -

87 (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

25. Flowing from the above Article 87, Parliament enacted the Election Petition Rules which under Rule 4 thereof stipulates that: -

- 1. The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions.
- 2. An election court shall, in the exercise of its powers under *the Constitution* and the Act, or in the interpretation of any of the provisions in these Rules, seek to give effect to the objective specified in sub-rule (1).

26. The main contest in the instant application is the issue of the late filing of the Record of Appeal. The question which begs an answer is whether this court can allow the late filing of the said record. Rule 19 of the Rules stipulates as follows: -

19. Extension and Reduction of Time

- (1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired.



- (2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined.
27. Rule 5 of the Election Petition Rules, on the other hand, states that: -
- (1) The effect of any failure to comply with these Rules shall be determined at the Court's discretion in accordance with the provisions of Article 159 (2) (d) of *the Constitution*.
- (2) A party to a petition or an advocate for the party shall assist an election court to further the objective of these Rules and for that purpose, to participate in the processes of the election court and to comply with the directions and orders of the election court.
28. The above cited provisions clearly give the court the discretion to extend time in election petition matters. It is however trite that where a matter is to be determined at the court's discretion, such discretion must be exercised judiciously and only in the most deserving cases.
29. A perusal of the court record reveals that the judgment of the Lower Court was delivered on 23rd February 2023. The copies of the proceedings and judgment were certified on 1st March 2023. The Applicants filed the Memorandum of Appeal on 2nd March 2023. The Record of Appeal was filed 6th April 2023 and the Decree certified and issued on 18th April 2023. The Supplementary Record of Appeal was filed on 5th May 2023.
30. From the above narration of the sequence of events that followed the delivery of the impugned judgment, it is clear that the Record of Appeal was filed at least 36 days after the filing of the Memorandum of Appeal. The Respondents contended that the Record of Appeal was therefore an afterthought having been filed way outside the stipulated timelines.
31. Rule 34 of the Election Petition Rules stipulates as follows on timelines: -
34. Appeals from Resident Magistrate's Court.
1. An appeal from a Resident Magistrate's Court under section 75 (1A) of the Act shall be in the form of a memorandum of appeal and shall be signed in the same manner as a petition.
 2. The memorandum of appeal under sub-rule (1) shall concisely set out under distinct heads the grounds of appeal without any argument or narrative from the judgment appealed from and the grounds shall be numbered consecutively.
 3. The memorandum of appeal under sub-rule (1) shall be filed at the nearest High Court registry within thirty days from the date of the judgment.
 4. The appellant shall, upon filing the memorandum of appeal in accordance with sub-rule (3), pay the fees prescribed in the Second Schedule.
 5. The appellant shall, within seven days of the filing of the memorandum of appeal in accordance with sub-rule (3), serve the memorandum of appeal on all parties directly affected by the appeal.
 6. The appellant shall, within twenty-one days of the filing of the memorandum of appeal in accordance to sub-rule(3), file a record of appeal which shall contain the following documents –
 - a. the memorandum of appeal;
 - b. pleadings of the petition;



- c. typed and certified copies of the proceedings;
 - d. all affidavits, evidence and documents entered in evidence before the magistrate; and
 - e. a signed and certified copy of the judgment appealed from.
7. On the filing of the memorandum of appeal in accordance with sub-rule (3), the registrar of the court to which the appeal is preferred shall, within seven days, send a notice of appeal to the election court from whose decree the appeal is preferred.
 8. The election court from which an appeal is preferred shall, upon receiving a notice under sub-rule (7), send the proceedings and all relevant documents relating to the petition to the High Court to which the appeal is preferred.
 9. The High Court to which the appeal is preferred shall, within thirty days of lodging the memorandum of appeal in accordance with sub-rule (5), fix a date for:
 - a. the giving of directions including directions as to the manner in which evidence and exhibits may be presented; and
 - b. the hearing of the appeal.
 10. The High Court to which the appeal is preferred may confirm, vary or reverse in whole or in part, the decision of the court from which the appeal is preferred and shall have the same powers and perform the same duties as are conferred and imposed on the court exercising original jurisdiction.
 11. An appeal filed under sub-rule (1) shall be heard and determined within three months of the date of lodging the appeal. [Emphasis mine]
32. It was not disputed that the Record of Appeal was filed 15 days after the lapse of the 21 days window period allowed under the above Rule 34 (6). The Appellants conceded that they filed the Record of Appeal late but attributed the delay to their inability to obtain the proceedings and certified copy of the decree in good time. In other words, the Applicants blamed the Lower Court for the delay in supplying them with the certified copies of the proceedings and judgment. They therefore explained that the delay was occasioned by reasons beyond their control.
33. My finding is that while the delay in obtaining proceedings and judgment may be a plausible reason warranting the consideration of the Court in an application for extension of time, such a claim must be adequately explained. This is the position that was adopted by the Supreme Court in *County Executive Committee of Kisumu vs. County Government of Kisumu & 8 others*, SC. Civil Appl. No. 3 of 2016; [2017] eKLR, where the Court emphasized the need for an applicant in an application for extension of time to satisfactorily declare and explain the whole period of delay to the Court. The court stated as follows: -
- “(24) a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered.” (Emphasis added)
34. In *Kenya Revenue Authority vs. Krish Commodities Limited*, Civil Application No. 23 of 2019 [2020] eKLR cited the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 others* [SC. Application no. 16 of 2014], [2014] eKLR the Supreme



Court highlighted the guiding principles that must be considered by the courts in deciding whether or not to extend time as follows: -

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.... We derive the following as the underlying principles that a Court should consider in exercising such discretion: -

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.”
35. The question that begs an answer is whether the Application meets the threshold set, by the above principles, for the granting of orders to extend time.
36. As I have already stated in this Ruling, the trial court record reveals that the copies of the proceedings and judgment were ready and certified on 1st March 2023. This means that certified copies of proceedings and judgment were available for the Applicants’ collection as at 2nd March 2023 when they filed the Memorandum of Appeal. Going by the timelines set under Rule 34 (6) of the Election Petition Rules, the Applicants should have filed the Record of Appeal within 21 days from the date of filing the Memorandum of Appeal which fell on 23rd march 2023. The Record of Appeal was however filed on 6th April 2023 which was 36 days after the filing of the Memorandum of Appeal and 15 days after the expiry of the statutory timelines.
37. From the above uncontested facts surrounding the filing of the pleadings herein, it is clear that the Applicants’ assertion that there was a delay in obtaining the typed proceedings thereby leading to a delay in filing the Record of Appeal is far from the truth. My take is that the Applicants’ assertions are either intended to mislead this court or to unfairly shift blame for the delay to the Lower Court when the facts of the case paint a completely different picture. I therefore find that the Applicants were not candid or truthful in their claim that there was a delay, by the Lower Court, in supplying them with the certified copies of the proceedings and judgment.
38. I further note that no letter requesting for certified copies of proceedings and decree, or certificate of delay from the lower court was exhibited on the Applicants’ supporting affidavit to prove that they applied for the proceedings in good time and that the delay was caused by the court. It is trite that he who comes to equity must come with clean hands and that equity will only aid the vigilant not



the indolent. I find that the Applicants are clearly not honest in their pleadings and are therefore not deserving of the orders sought.

39. It did not escape the attention of this court that it took the Applicants a whole one (1) month from the date of filing the Record of Appeal to the date of filing the instant application to regularize the delay in filing the said Record. This court's impression of the Applicants is that they are parties who are neither diligent nor vigilant in pursuing their appeal despite the strict timelines set under the Election Petition Rules. The actions or inaction by the Applicants portray them as parties who have a penchant for breaking or ignoring every Rule in the book without any care. I say so because upon lodging the Memorandum of Appeal on 2nd March 2023, then under Rule 34 (9) of the Election Petition Rules this court was required to, within thirty days of lodging the appeal, fix a date for the giving of directions including directions as to the manner in which evidence and exhibits may be presented; and the hearing of the appeal.
40. My computation of days from 2nd March 2023 when the Appeal was lodged shows that directions on the hearing of the Appeal ought to have been issued by 3rd April 2023. Needless to say, the Appellants had not filed the Record of Appeal as at 3rd April 2023.
41. Furthermore, Rule 34 (11) of the Election Petition Rules requires this court to hear and determine the Appeal within three months of the date of lodging the appeal. Computation of days places the last day for the finalization the Appeal at 3rd June 2023, barely 2 days from the date of this Ruling. This is to say that should this court allow the instant application, then, under the Rules, it will only have 2 days to issue directions on the hearing the appeal and determine the same by 3rd June 2023. My above computation of days reveals that even though the Memorandum of Appeal was filed within the statutory timelines, the Applicants thereafter went to slumber or a go-slow only to wake up and file the instant application on 7th May 2023 barely one month to the expiry of the period within which the appeal is to be heard and determined, according to the Election Petition Rules.
42. In a nutshell, I find that no plausible explanation was given for the delay and that the Applicants lacked candour in shifting the blame for the delay to the lower court. I further find that, owing to the strict timelines in election petitions, the delay in filing the Record of Appeal was inordinate and inexcusable. What amounts to inordinate delay was discussed in the case of *Mwangi S. Kimenyi vs. Attorney General & Another* (2014) eKLR where it was held thus: -
- “There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth” nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable....”
43. In *Raila Odinga and 2 others vs IEBC and 3 Others* [2013] eKLR the Supreme Court stated that: -
- “The parties have a duty to ensure that they comply with their respective timelines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the court as a result of omissions or inadvertences which are foreseeable or could have been avoided.”
44. The 4th Respondent's complaint was that he was not served with the Memorandum of Appeal in contravention of Rule 34 (5) of the Election Petition Rules which requires the Appellant to serve the



Memorandum of Appeal on all parties directly affected by the appeal within seven days of the filing of the memorandum of appeal. The 4th Respondent stated that he became aware of the appeal on 16th April 2023. As I have already stated in this Ruling, the Memorandum of Appeal was filed on 2nd March 2023 which means that the 4th Respondent should have been served with the same by 9th March 2023. My finding is that the failure, by the Applicants, to serve the 4th Respondent with the Memorandum of Appeal on time or at all reinforces this court's finding that the Applicants were not keen in complying with the Rules.

45. My above findings on the issue of the delay in filing the Record of Appeal would have been sufficient to determine this Application. I am however still minded to consider the Applicants argument that this case involves public interest thus warranting the exercise of this Court's discretion to allow the application. The principles for certifying a matter as one of public interest/importance were laid down in the case of *Hermanus Phillipus Steyn vs. Giovanni Gnechi- Ruscone* Supreme Court Application No. 4 of 2012 (2012) eKLR as follows: -

“Before this Court, ‘a matter of general public importance’ warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern”.

(See also *Malcolm Bell vs. Daniel Toroitich Arap Moi* Supreme Court Application No. 1 of 2013, (2013) eKLR.)

46. My finding is that the Applicants have not demonstrated that this Appeal meets the threshold for certification as a public interest matter as required by the *Hermanus Steyn* case. The Applicants have not indicated how this appeal impacts on the public and whether its consequences are substantial, broad-based thus transcending the litigation-interests of the parties herein and bearing upon the public interest. My take is that, in the circumstances of this case, allowing this application will set a dangerous precedent that will allow parties to delay the finalization of election petitions thereby defeating the overriding objective in election petitions, as stated under Rule 4 of the Election Petition Rules, which is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions. I am of the view that public interest in election petitions requires that electoral disputes are heard and determined expeditiously so that parties to the dispute and the electorate can know the outcome of the suit in the shortest time possible. Indeed, days are gone when election petitions would linger in court for months on end and sometimes, even up to the next election circle.
47. I further find that the Applicants did not demonstrate the manner in which they will be prejudiced if the prayers sought in the Application are not granted. On the flipside, it is the Respondents who will suffer the prejudice and inconvenience of being dragged back to court to respond to an appeal, within very limited period, when they had already considered it closed upon the expiry of the appeal period. I am therefore not persuaded to exercise my discretion in their favour in this regard.
48. In view of my above findings, I am of the view that the issue of security for the costs of this appeal is now moot.
49. Having regard to the findings and observations that I have made in this Ruling, I find that the Application dated 7th May 2023 is not merited and I therefore dismiss it with costs to the Respondents.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 31ST DAY OF MAY 2023.



W. A. OKWANY
JUDGE

