



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**ELECTION PETITION APPEAL NO. 02 OF 2018**

**FAITH MWENDE KASYOKA.....APPELLANT**

**VERSUS**

**INDEPENDENT ELECTORAL & BOUNDARIES**

**COMMISSION.....1<sup>ST</sup> RESPONDENT**

**SUDI MASHA.....2<sup>ND</sup> RESPONDENT**

**DADU DAVID KADENGE.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. In an application dated 21st February, 2018 brought under the provisions of Order 51 rule 1 of the Civil Procedure Rules, Rules 4, 5 and 19 of the Elections (Parliamentary and County) Petition Rules, 2017, Section 80(1)(d) of the Elections Act, 2011 and Articles 22, 27, 48, 50, 159(2)(d) and 259 of the Constitution of Kenya, 2010 and all other enabling provisions of the law, the applicant seeks the following orders:-

(i) Spent;

(ii) That this Honourable Court do extend the time within which to file the Record of appeal out of time (sic), and;

(iii) Costs be in the cause.

2. The application is premised on the grounds on the face of it and the supporting affidavit of the applicant, Faith Mwendu Kasyoka sworn on 21<sup>st</sup> February, 2018. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed grounds of opposition on 27<sup>th</sup> February, 2018, to oppose the said application. The 3<sup>rd</sup> respondent filed a replying affidavit on 13<sup>th</sup> of March, 2018.

3. Following directions given by the court, Counsel for the applicant filed his written submissions on 12<sup>th</sup> March, 2018. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed his on 19<sup>th</sup> March, 2018. Counsel for the 3<sup>rd</sup> respondent filed his written submissions on 15<sup>th</sup> March, 2018. The said submissions were thereafter highlighted.

4. Mr. Aboubakar, Learned Counsel for the appellant/applicant seeks orders for extension of time to file a record of appeal following a memorandum of appeal that was filed on 8th January, 2018. The appeal arises from the decision of Hon. S. R. Wewa delivered on 11<sup>th</sup> December, 2017 in Malindi Chief Magistrate's Court Election Petition No. 6 of 2017.

5. He submitted that rule 34(3) of the Election (Parliamentary and County) Petition rules, 2017 requires a memorandum of appeal to be filed within 30 days from the date of the Judgment, in compliance with Section 75(1A) of the Elections Act. He stated that an appellant must thereafter within 7 days serve the memorandum of appeal under rule 34(5) of the said rules. It was submitted that the memorandum of appeal was filed within 30 days of the decision by the lower court and that the applicant was required to file the record of appeal within 21 days of filing of the memorandum of appeal.

6. Counsel for the applicant submitted that there is no provision in the Constitution that provides for the timelines of filing of an appeal from the Lower Court to the High court. He further submitted that it is the rules that provide the timelines for filing the record of appeal and not the Elections Act. He therefore argued that the provisions of rule 19 of the Elections (Parliamentary and County) Petition rules, 2017 apply and the same confer on the court discretion to extend time for filing a record of appeal. He submitted that the foregoing was captured in **Evans Odhiambo Kidero and 3 Others vs Ferdinand Ndungu Waititu and 4 Others** [2014] eKLR, where the Supreme Court was

categorical that timelines expressed by the Constitution and statutes cannot be extended. Mr. Aboubakar argued that any other time provided by the rules is subject to extension of time, depending on the court's discretion.

7. In making reference to paragraph 132 of the said Judgment, he submitted that the Supreme Court held that provisions of the Elections Act are normative derivatives and a court of law cannot disengage from the Constitution. He made reference to paragraph 196 thereof where the said court held that an election petition appeal filed out of time is incompetent.

8. Counsel also made reference to paragraphs 258, 260 and 263 of the said Judgment that provides for the right to a fair hearing. He stated that in the present appeal, they were late in filing the record of appeal by 21 days and the reasons for the said delay are explained in the supporting affidavit.

9. With regard to paragraphs 272 and 273 of the **Evans Odhiambo Kidero and 3 Others vs Ferdinand Ndungu Waititu and 4 Others** Judgment (supra), Counsel submitted that the Supreme Court distinguished the reason why the timelines for filing of documents out of time in **Raila Odinga and Others vs Independent Electoral and Boundaries Commission and 3 Others [2013] eKLR**, were not extended. Mr. Aboubakar therefore contended that the general rule is that a court can extend time when the time span of the case is longer than in a presidential election petition.

10. Counsel indicated that in a ruling delivered in **Raila Amolo Odinga and Another vs Independent Electoral and Boundaries Commission and Others [2017] eKLR**, at paragraph 10, the Supreme Court was of the view that they could not grant the orders sought as it would dispose of the entire case at the preliminary stage.

11. It was submitted by Counsel for the applicant that if their application fails, it will drastically prejudice the applicant as denial of the orders sought will lead to disposal of the entire appeal, which would be a drastic action on the court's part.

12. Mr. Aboubakar cited Mombasa High Court Election Petition No. 4 of 2017, **Mwahima Mwalimu Masudi vs. Independent Electoral Boundaries Commission and 3 Others [2017] eKLR**, where the court extended time for the respondent to file responses out of time after relying on the case of **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and 7 Others [2014] eKLR**. He stated that administration of justice requires the provisions of Articles 48, 49 and 50 of the Constitution to be adhered to.

13. Counsel for the applicant submitted that the application herein was filed on 21<sup>st</sup> February, 2018 which was on a timely basis as the deadline for filing the record of appeal was on 29th January, 2018 but it was taken to the registry on 2nd February, 2018. He stated that failure to comply with the timelines is explained in that the applicant was represented by another Advocate in the lower court who refused to release the applicant's file due to issues of fees. He added that they had to make copies of pleadings from the court file. He indicated that the reason for failing to adhere to the timelines has been explained and that the applicant has taken positive steps in complying with rule 34 of the Elections (Parliamentary and County) Petition rules save for sub-rule 6 thereof. It was argued that failure to comply was not due to the applicant's inaction but by her previous Advocate.

14. It was submitted for the applicant that no prejudice will be caused to the respondents by giving the applicant the orders sought to file the record of appeal out of time as it will give the parties an opportunity to dispose of the appeal on merits. In addition, he stated that the timelines can also be met if the applicant is given time to argue the appeal.

15. Counsel cited the case of **Samwel Kazungu Kambi vs. Nelly Ilongo and 3 Others [2017] eKLR** where W. Korir J., extended time for depositing of security for costs where timelines were provided by law. In his concluding submission, Mr. Aboubakar indicated that if the court allows the applicant to file her record of appeal, the court will only consider the issue of failure to disclose the election results. He stated that the Court of Appeal has pronounced itself on the said issue and so have High Courts. He submitted that if the orders sought are not granted, the applicant will suffer a gross violation of her rights under the provisions of Articles 48, 49, 50 and 35(1)(b) of the Constitution.

16. Ms. Aoko, Learned Counsel for the 3<sup>rd</sup> respondent highlighted submissions on behalf of her client and on behalf of Mr. Kadima for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. With regard to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, she stated that the Constitution and the Elections Act and rules thereunder do not give the right for extension of time for filing the record of appeal. She cited the case of **Evans Odhiambo Kidero vs Ferdinand Waititu and 4 Others** (supra) to support her argument. She submitted that if the applicant was desirous of having the appeal heard, she would have filed the record of appeal on 29th January, 2018 but she did not.

17. With regard to paragraph 5 of the applicant's affidavit where she states that her Advocate herein was handling so many election petitions, Counsel stated that was not a convincing explanation as there are many other Advocates she could have engaged to handle the appeal. The 1<sup>st</sup> and 2<sup>nd</sup> respondents prayed for the application to be dismissed with costs.

18. On behalf of the 3<sup>rd</sup> respondent, Ms. Aoko relied on the replying affidavit of the 3<sup>rd</sup> respondent filed on 13<sup>th</sup> March, 2018 and her written submissions. She argued that the court has no jurisdiction to extend time to file a record of appeal. She indicated that the Elections Act and the Elections (Parliamentary and County) Petition rules, 2017 have set timelines and are anchored on Article 87(1) of the Constitution which gives parliament the power to enact laws for election petitions.

19. Counsel cited the provisions of Section 75 of the Elections Act and rule 34 of the Elections (Parliamentary and County) petition rules which she indicated are couched in mandatory terms. She further stated that election petitions are governed by special laws and have timelines within which they and election petition appeals must be heard.

20. On the issue of the non-availability of the applicant's Advocate due to a busy schedule, Ms. Aoko submitted that they could have requested for copies of proceedings from court to enable them to file the record of appeal. She stated that there was no annexure to the applicant's affidavit showing that they sought and paid for typed proceedings. She contended that the delay herein is unjustified. She relied

on the case of **Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission** (supra) where the Supreme Court cited the words of Hon. Kiage J.A., that the Court of Appeal and all courts must never provide succor and cover for parties who exhibit scant respect for rules to hide behind the provisions of Article 159(2)(d) of the Constitution.

21. Counsel for the 3<sup>rd</sup> respondent argued that the court cannot extend time where the statute and rules do not provide for the same. She indicated that the applicant deposed that she attempted to file the record of appeal a day after the timelines provided and it was rejected by the Deputy Registrar.

22. Ms. Aoko submitted that the **Nicholas Kiptoo Arap Korir Salat** case (supra) set the criteria for extension of time and the court stated that extension of time is not a right but an equitable remedy.

23. She submitted that the application herein was filed on 21<sup>st</sup> February, 2018 which was about a month after the deadline for the filing of the record of appeal and no explanation has been given for the delay.

24. In distinguishing the present application from that made in the **Mwalimu Masudi Mwachima** case (supra), she stated that the prayer in the latter case was for responses filed out of time to be deemed as having been filed on time and the court exercised its discretion in favour of the applicant. She stated that in the present appeal, no record of appeal has been filed and as such the court is not being asked to deem the record of appeal as being properly on record.

25. Counsel submitted that the **Samwel Kazungu** case (supra) addressed the deposit of security for costs outside the timelines allowed and as such the circumstances of the said case are different from the present application.

26. Her parting shot was that the election petition appeals that have succeeded in the High court were filed expeditiously within the timelines allowed. She prayed for the application to be dismissed with costs.

27. In responding to the issue of the court's jurisdiction to extend time in the application before the court, Mr. Aboubakar submitted that a reading of rule 19 of the Election (Parliamentary and County) Petition rules shows that the court has the jurisdiction to do so. He further submitted that rule 34(6) of the said rules which provides the time for filing the record of appeal is subject to rule 19 of the rules.

28. Counsel also cited the provisions of rules 4 and 5(1) of the rules which state that the effect of any failure to comply with the rules shall be determined at the court's discretion. He indicated that the court therefore has the jurisdiction to extend time. He submitted that a delay of 22 (sic) days was not inordinate as it has been well explained by the applicant.

29. On the issue of the applicant being represented by him, Mr. Aboubakar stated that she has a right to be represented by an Advocate of her own choice.

30. On the issue of the record of appeal being rejected by the Deputy Registrar for being taken for filing outside of the timelines allowed, Counsel for the applicant stated that the foregoing issue had not been controverted in the replying affidavit. He therefore submitted that he could not present evidence he did not have as the Deputy Registrar rejected the record of appeal and asked them to file an application.

31. With regard to the **Nicholas Salat Korir** case (supra), Counsel for the applicant stated that the Supreme Court was clear that under Article 159(2)(d) of the Constitution, courts will not assist a party who has not complied with the rules and directions of the court. He however urged the court to exercise its discretion as per the decision in the **Nicholas Salat Korir** case (supra).

32. He submitted that rule 19(1) of the Elections (Parliamentary and County) Petition rules provides that a court can extend time even where the period has expired. He indicated that unlike the **Mwalimu Mwachima Masudi** case (supra), the court registry did not allow them to file the record of appeal out of time.

33. He asserted that the principles in the cases of **Kazungu Kambi case and Mwalimu Mwachima Masudi** (supra) are similar to this case as they are on extension of time.

## **ANALYSIS AND DETERMINATION**

The issue for determination is if this court should grant extension of time for filing the record of appeal in an election petition appeal.

34. The memorandum of appeal herein was filed on 8<sup>th</sup> January, 2018 in compliance with the provisions of rule 34(3) of the Elections (Parliamentary and County) petition rules, 2017 (hereinafter referred to as the rules). The filing of the same was done within the required timelines of 30 days from the date of the decision by the Principal Magistrate in Malindi Chief Magistrate's Court Election Petition No. 6 of 2017. Sub-rule 6 of the said rule provides as follows:-

***“The appellant shall, within twenty-one days of the filing of the memorandum 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 and a certificated copy of the decree.”*

35. The applicant, Faith Mwendu Kasyoka in her affidavit in support of the application deposes in paragraph 4 that she was required to file her record of appeal by 29<sup>th</sup> January, 2018 but the same was presented to the registry on 30<sup>th</sup> January, 2018 but they refused to accept the same without leave of the court.

36. In paragraph 5 of the said affidavit, she gives the reasons for delay in filing, the record of appeal as being that:-

(i) She had to engage a new firm of Advocates to pursue the appeal on her behalf;

(ii) She obtained certified proceedings sometime after 3<sup>rd</sup> January, 2018 and had to get the pleadings from the court file as her original file was with her former Advocates who were holding it until she paid all their outstanding fees;

(iii) That her new Advocate, Mr. Aboubakar was engaged in a number of election petitions and he was the only one available at his office as his associate had quit in January, 2018 and his partner was admitted in hospital after undergoing surgery; and

(iv) She listed 9 election petitions that her current Advocate was seized of.

37. In her affidavit at paragraph 6, the applicant asserts that it was not through neglect that her Advocate failed to file the record of appeal within time but it was due to him being overwhelmed by the responsibilities he was carrying at that time. The applicant further deposes in the said affidavit that it is in the interest of justice for her to be granted the orders sought and that no prejudice will be suffered by the respondents as they shall have the opportunity to be heard in response to the appeal.

38. Mr. Aboubakar in arguing his client's application held the view that the applicant was entitled to a right to be heard as espoused in articles 22, 27, 48, 50 and 259 of the Constitution of Kenya, 2010. He indicated that there are no provisions in the Constitution and the Elections Act that provide for the timelines for filing the record of appeal in election petition appeals. He stated that if the same had been provided for, courts would have no jurisdiction to extend time. He relied on rule 19 of the rules which gives the court discretion to extend time. In his view, discretion extends even to the filing of the record of appeal. He also relied on rules 4 and 5 of the rules.

39. He indicated that they were late by 21 days in filing the record of appeal and when it was taken to the Deputy Registrar it was rejected and they were told to apply for admission of the same out of time. He also indicated that they filed the application dated 21<sup>st</sup> February, 2018 on a timely basis.

40. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application by filing grounds of opposition on 27<sup>th</sup> February, 2018 which were expounded on, by Ms. Aoko who held brief for the law firm of Kadima and Company Advocates. The grounds of opposition are to the effect that the application dated 21<sup>st</sup> February, 2018 is frivolous and goes against the spirit of the rules envisaged by rule 4 of the rules which make time and parties commitment to the court process of essence. The grounds of opposition further state that the delay to file the record of appeal is inordinate thereby depriving the applicant the benefit of the court's discretion to be exercised under rule 5 of the rules.

41. In addition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents state that rule 34(6) requires the record of appeal to be filed within 21 days of the filing of the memorandum of appeal that was filed on 8<sup>th</sup> February, 2018. It further states that 21 days expired on 29<sup>th</sup> January, 2018 yet the application herein which is dated 21<sup>st</sup> February, 2018 was filed 30 days (sic) after time expired for filing of the record of appeal, hence the delay explains lack of interest on the part of the applicant.

42. In the 1<sup>st</sup> and 2<sup>nd</sup> respondents' view the one (1) month left (before the elapse of the 6 months provided for the hearing of election petition appeals) is not adequate for the court to conduct case conference and hear and determine the appeal and give them enough time to prepare for trial. They opine that the reasons given by the applicant for delay are not valid, lack merit and are a mere excuse which should not be considered by the court, thus the ends of justice are in favour of striking out the application as to sustain it will cause grave prejudice to the respondent.

43. Ms. Aoko in highlighting the grounds of opposition and submissions filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents Counsel also submitted that the Elections Act and rules thereunder do not give the right for extension of time for filing the record of appeal. She relied on the case of **Evans Kidero vs Ferdinand Ndungu Waititu vs IEBC & 4 Others** [2014] eKLR.

44. In submitting for the 3<sup>rd</sup> respondent, she held the position that this court has no jurisdiction to extend time to file a record of appeal as the Elections Act and rules thereof have timelines for doing certain acts. She submitted that Section 75 of the Elections Act and rule 34 of the rules are couched in mandatory terms. She was of the view that the applicant or her Advocate could have requested for proceedings on 8<sup>th</sup> January, 2018 to enable her to file the record of appeal, thus delay is not justified. She relied on the case of **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and 6 Others** [2013] eKLR in stating that this court should not entertain an applicant who has no respect for rules and timelines. She was of the view that the court cannot extend time where the statute and rules do not provide for the same. Ms. Aoko took the same stand as Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents in that the application herein was not filed expeditiously as it was filed almost a month after the deadline for filing of the record of appeal and no explanation has been given for the delay.

45. She distinguished the holding in **Mwahima Mwalimu Masudi** case (supra) as well as that of **Samwel Kazungu Kambi** (supra) from the present application and stated that the *ratio decidendi* therein was not applicable to the present application.

46. Rules 4 and 5 of the rules provide as follows:-

***“4. (1) The objective of these rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions.***

***(2) an election court shall, in the exercise of its powers under the Constitution and Act, or in the interpretation of any of these Rules, seek to give effect to the objective specified in sub-rule (1).***

***5. (1) The effect of any failure to comply with these rules shall be determined at the court’s discretion in accordance with Article 159(2)(d) of the Constitution.***

***(2) A party to a petition or an Advocate for the party shall assist the 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.”*** (emphasis added).

47. A reading of the above provisions leave no room for doubt that the rules are meant to not only ensure that justice is done to parties that come before the courts with election disputes but that such petitions or election petition appeals are heard expeditiously. One of the critical elements in electoral laws and rules is the timelines set for doing certain acts. The filing of the record of appeal is not an exception to that rule. It is time bound with an appellant being given 21 days to file the record of appeal after having filed a memorandum of appeal. Contrary to the submissions made by Ms. Aoko, this court’s hands are not tied by the fact that the Elections Act and the rules do not expressly provide for extension of time in the filing of a record of appeal.

48. An interpretation of rule 5(1) of the rules is indicative of the fact that this court is clothed with the discretion to determine if time should be extended for the filing of the record of appeal while bearing in mind the provisions of Article 159(2)(d) of the Constitution of Kenya, for justice being administered without undue regard to procedural technicalities. Each case must however turn on its own special circumstances.

49. Mr. Aboubakar urged the court to exercise its discretion in line with the provisions of rule 19 of the rules. The said provisions state as follows:-

***“(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 and determined.”*** (emphasis added).

50. The above provisions do give courts wide powers to consider applications for extension of time where set timelines are stipulated in the rules. Rule 19(2) of the rules expressly exclude the extension of time within which a petition is required to be filed, heard or determined. The said provisions do not exclude the extension of time for filing a record of appeal.

51. I am therefore in agreement with Mr. Aboubakar that this court has the discretion to extend time for the filing of the record of appeal. I consider lateness in filing of the same as a procedural technicality under the provisions of Article 159(2)(d) of the Constitution. In the case of **Evans Kidero and 3 Others vs Ferdinand Ndungu Waititu and 4 Others** (supra) the Supreme Court held that timelines expressed by the Constitution and statutes cannot be extended. Limitation as to the time of filing of the record of appeal herein is however set by the rules and therefore the present application falls outside the ambit of the said authority.

52. The decisions cited by Counsel for the applicant in Mombasa High Court Election petition No. 4 of 2017, **Mwahima Mwalimu Masudi vs Independent Electoral and Boundaries Commission and 3 Others** and **Samwel Kazungu Kambi vs Nelly Ilongo and 3 Others** (supra) were rendered by courts of concurrent jurisdiction and are therefore of persuasive value to this court. The said decisions however dealt with applications for extension of time for factors that are not similar to the present circumstances.

53. The most appropriate authority that guides courts on issues of extension of time is the Supreme Court decision in **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and 7 Others** (supra) where the court set out the following principles that should be considered in exercise of a court’s discretion in extension of time:-

***“(i) 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;***

***(ii) A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;***

***(iii) Whether the court should exercise discretion to extend time is a consideration to be made on a case to case basis;***

***(iv) Where there is a reasonable cause for the delay. The delay should be expressed to the satisfaction of the court;***

(v) *Whether there will be any prejudice suffered by the respondents, if extension is granted;*

(vi) *Whether the application has been brought without undue delay and;*

(vii) *Whether in certain cases, like Election Petitions, public interest should be a consideration for extending time.”*

54. The applicant in her affidavit has explained that she was a day late in the filing of the record of appeal but the registry refused to accept the same without leave of the court. The date as to when the record of appeal was taken to the registry did not come out clearly as her Counsel stated that it was taken there after 21 days of the deadline for filing of the same. She has explained in her affidavit the predicament she faced as her file was held by her former Counsel due to non-payment of outstanding fees. The applicant has shown the reason why her Counsel was unable to file the record of appeal on time, due to what is said to be demand of his legal services in electoral disputes.

55. Although Ms. Aoko argued that the applicant could have instructed any other Advocate other than Mr. Aboubakar to represent her, this court notes that the choice of Counsel for a litigant is a very personal decision which is based on considerations only known to such a litigant.

56. I note that although the applicant has not given a plausible reason as to why she filed the present application 21 days after the deadline prescribed for filing of the record of appeal, the appeal herein arises from an electoral dispute, which revolves around public interest whereby her fellow constituents need to know whether the person who was declared the winner of the elective post of Member of the County Assembly, was validly elected. The said consideration falls within the principles set down by the Supreme Court in the case of **Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission and 7 Others** (supra).

57. In the decision of **Raila Odinga and Others vs Independent Electoral and Boundaries Commission and 3 Others** (supra), the Supreme Court held as follows:-

*“A court of law should not allow the prescriptions of procedure and form to trump the primary objective of dispensing substantive justice to the parties. The principle of merit however, in our opinion bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course.”*

58. This court’s understanding of the provisions of rule 5(1) and 19 of the rules is that it gives courts considerable latitude in exercising its discretion in the interpretation of electoral laws and rules. The Court of Appeal in Malindi Election Petition No. 3 of 2018, **Mbaraka Issa Kombe vs The Independent Electoral and Boundaries Commission and 2 Others** cited with approval the decision of the Supreme Court of India in **Reserve Bank of India vs Peerless General Finance and Investment Co. Ltd. and Others** [1987]1 SCC 424 as follows:-

*“Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say of the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual.”*

59. The court’s understanding based on the foregoing decision is that the provisions of rules 34(6), 4, 5(1) and 19 of the rules must read as a whole in construction of whether the Rules committee intended to give a court discretion to extend time in the filing of the record of appeal. It is my finding that the court has discretion to extend such time under rule 19 of the rules.

60. On the overriding objectives of fairness, justice, speed, proportionality, timely and cost saving disposal of cases, the Court of Appeal in **City Chemist (Nairobi) and Another vs Orient Commercial Bank Limited**, Civil Application No. Nairobi 302 of 2008 (unreported) stated that the application of the overriding objectives do not operate to uproot established principles and procedures but embolden the court to be guided by a broad sense of justice and fairness.

61. In **Mbaraka Issa Kombe vs Independent Electoral and Boundaries Commission and 2 Others** (supra) the Court of Appeal asserted what it has said time and again that rules of procedure are meant to be handmaidens of justice and should not be elevated to the status of mistresses of justice. The court further went on to state as follows:-

*“In totality, the Election court will have to look into the nature of the non-compliance, that is, does it go to the jurisdiction of the court? Does it go to the root of the dispute? Does it occasion prejudice to the other party?”*

62. In the present application, the non-compliance does not go to the jurisdiction of the court, it does not go to the root of the dispute and the respondents did not show the prejudice they would suffer if this court grants the orders sought.

63. In the interest of justice and with a view of giving the applicant her day in court, the application dated 21<sup>st</sup> February, 2018 is hereby allowed. Although costs follow the event, the application before this court has come about due to delay occasioned by the applicant in filing her record of appeal. I therefore award costs of the application to the respondents.

It is so ordered.

**DELIVERED, DATED and SIGNED at MALINDI on this 25th day of May, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Ms. Bakari holding brief for Mr. Aboubakar for the appellant/applicant

Ms Aoko for the 3<sup>rd</sup> respondent and holding brief for the 1<sup>st</sup> and 2<sup>nd</sup> respondents

Mr. Oliver Musundi - Court Assistant