



Gathoni v Independent Electoral & Boundaries Commission & 4 others (Election Petition Appeal E001 of 2023) [2023] KEHC 20214 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20214 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
ELECTION PETITION APPEAL E001 OF 2023
AK NDUNG’U, J
JULY 13, 2023**

BETWEEN

NDUNGU ESTHER GATHONI APPELLANT

AND

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

UNITED DEMOCRATIC ALLIANCE PARTY 2ND RESPONDENT

KIHIKA CAROLINE WANJIKU 3RD RESPONDENT

MURIUKI MARY GATHONI 4TH RESPONDENT

CLERK, LAIKIPIA COUNTY ASSEMBLY 5TH RESPONDENT

*(Appeal from original Decree in Nanyuki Chief Magistrate’s
Election Petition No E001 of 2022 – Kithinji A.R, CM)*

RULING

1. The Appellant/Applicant, Ndungu Esther Gathoni, was the Petitioner in the Election Court below in Nanyuki Chief Magistrate’s Election Petition No E001 of 2022. By her petition therein, the Applicant challenged her removal from UDA Party Laikipia County Member of County Assembly (gender top up). The Election Court delivered its judgement on 15th February, 2023 and dismissed the petition with costs to the Respondents.
2. Being dissatisfied with the entire judgment, the Applicant filed a memorandum of appeal dated 13/03/2023. The court record shows that the Applicant filed a notice of motion application dated 04/05/2023 seeking for leave of this court to enlarge time within which the Applicant may file the record of appeal and supplementary record of appeal and that the annexed record of appeal and supplementary record of appeal be deemed as duly filed subject to payment of court fees. The



- application is brought under Article 159(2)(d) and 259(9) of *the Constitution*, Section 80(1) (d) of Election Act, Section 59 of *Interpretation and General Provisions Act* and Rule 19(1) and 34 of the Election (Parliamentary & County) Petition Rules, 2017. This ruling resolves that application.
3. The application is supported by a supporting affidavit sworn by the Applicant. She deponed that her advocate filed a memorandum of appeal within timelines but due to matters beyond their control, the Applicant failed to procure a certified decree within the requisite time to enable the advocate to file the record of appeal within time. That the Elections (Parliamentary and County Elections) Petition Rules, 2017 requires a party to attach a decree in the record of appeal. The Applicant avers that the decree was not available as the trial magistrate had proceeded for annual leave and was therefore unavailable to append his signature on the decree which culminated with the Applicant filing and serving a record of appeal dated 03/04/2023 without a copy of the decree. That the decree is dated 15/02/2023 but was only signed on 27/04/2023. That the delay is curable and the Respondents shall not be prejudiced if leave is granted and that the delay is a procedural technicality.
 4. The 1st Respondent filed grounds of opposition dated 27/06/2023 opposing the Applicant's prayer number 2 in the application on account that the record of appeal introduced documents which were not introduced or filed by any of the parties during trial.
 5. The 2nd Respondent did not file a replying affidavit to the Applicant's application but however filed submissions opposing the Applicant's application.
 6. The 3rd Respondent through a replying affidavit dated 08/06/2023 did not oppose the Applicant's prayer for enlargement of time to file the record of appeal out of time but opposed the application to the extent of admission of certain documents contained in the Applicant's record of appeal dated 03/04/2023 for they were not filed before the trial court. It is their case that the said documents which are certificates of electronic evidence were not filed before the trial court hence attaching the same to the record of appeal is attempting to file additional documents through the back door. Further, that the 3rd Respondent stands to suffer prejudice as they would be denied the opportunity to test the veracity of the said documents which is a violation to their right to fair hearing.
 7. The 4th Respondent filed a replying affidavit dated 19/06/2023 opposing the Applicant's application. She deponed that the certified proceedings and judgment were certified on 01/03/2023 and that her counsel was served with a record of appeal dated 03/04/2023 which had not been stamped by the court hence, the record of appeal and supplementary record of appeal were filed out of time and without leave of the court. She averred that extension of time is an equitable remedy and that court has discretion to extend time if certain principles are met. That the Applicant has not met the objective of timelines and the application is inconsistent with her legitimate expectation to know within the shortest time possible whether to rest her case and that she will be prejudiced if the application is allowed in view of her legitimate expectation.
 8. She deponed further that the Applicant has failed to produce correspondences to show that she applied for the decree. That no material was placed before this court to show that the trial court was on leave and that certificate of delay has not been attached. She stated that if the application is allowed, she objected the inclusion of the decree and termed it inconsistent with the trial court judgement, the certificate of electronic evidence, a copy from the standard newspaper dated 27/07/2022 which is inconsistent with the copy produced during trial and copies of annexures attached to her affidavit of response to the petition dated 12/10/2022.
 9. The 5th Respondent filed a replying affidavit opposing the application. He deponed that the Applicant had 21 days from the date of filing the memorandum of appeal to file the record of appeal. That on 13/04/2023, his advocate was served with a record of appeal that did not bear court stamp hence



- difficult to discern when it was filed. Upon perusal of the court file, his advocate discovered that the record of appeal was filed beyond the 21 days' timelines. That the allegations that the Applicant failed to file the record of appeal on time due to non-availability of the decree is unfounded. That the Applicant has not placed any material before this court to demonstrate that there was delay in obtaining the certified copy of the decree. That the decree filed by the Applicant is dated 15/02/2023 and there is nothing to disapprove the fact that the decree was signed on the said date. That no certificate of delay has been proffered by the Applicant and that the Applicant has not exhibited any correspondence showing that he applied and paid for certified copy of decree and followed up on the same.
10. In response, to 3rd and 4th Respondents' replying affidavit, the Applicant filed a further affidavit dated 25/06/2023. The Applicant deponed that the 3rd Respondent did not oppose the application for enlargement of time but opposed the admission of certificate of electronic evidence. That the 3rd Respondent was supposed to file a stand-alone formal application to support her application for expulsion of the said documents from the record of appeal and that the 3rd Respondent's opposition is premature as the 3rd Respondent was advised by this court that that issue will be handled at the hearing of appeal.
 11. The Applicant further averred that the record of appeal was filed electronically hence it was not possible to bear the official physical stamp and that filing the record of appeal out of time was not prejudicial to the Respondents. That the Applicant made numerous visits to the court and through email correspondences inquired on the status of the decree after preparing a draft decree on 15/02/2023 which was only approved after the lapse of time. That she was desirous of filing the record of appeal on time but was faced with impediment of extracting decree and that the 3rd and 4th Respondents replying affidavits are geared toward wasting court's time and should be disregarded.
 12. The Applicant filed submissions in response to the 1st Respondent grounds of opposition dated 27/06/2023 and 2nd Respondent's written submissions and argued that the issue of whether the subject documents (certificate of electronic evidence) should be expunged from the record of appeal is a matter that can only be addressed once the record of appeal has been admitted and it is imperative that the same be canvassed during the hearing of the appeal.
 13. The Applicant filed a further affidavit dated 06/06/2023 in response to the 5th Respondent's replying affidavit and deponed that the record of appeal was filed electronically hence it was not possible to bear the official physical stamp. That filing the record of appeal out of time was not prejudicial to the 5th respondent and to other Respondents who are not opposed to the application and that he reached out to the court on numerous occasions inquiring on the status of the decree and that he was desirous of filing the record on time but could not do so due to delay in obtaining the decree.
 14. Following directions given by this court, the application was canvassed by way of written submissions. The Applicant submitted that the application for enlargement of time was not opposed by the Respondents except the 5th Respondent. That the Applicant took the necessary steps to obtain the decree which is a pre-requisite in filing the appeal but the delay was occasioned by the trial court which was away on leave and the decree could not be signed within the prescribed time. That the delay is inordinate and the same is not prejudicial to the Respondents who were served with the record of appeal on time. The counsel submitted that Rule 19 of the Election (Parliamentary and County) Petitions Rules allows the court to extend time and that this power is extended to the High Court by Rule 34(10). The counsel submitted that according to the Rules, filing the record of appeal late is not fatal as the court has jurisdiction to extend time in interest of justice. He relied on the case of John Munuve Mati vs Returning Officer Mwingi North Constituency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu (2018) eKLR in which the court considered strict adherence



- to timelines in respect to appeals. The Applicant urged the court to be guided by Article 159 of *the Constitution* since the delay was not inordinate.
15. The Applicant also relied on the case of Twaher Abdulkarim Mohamed vs Mwathethe Adamson Kadenge & 2 others (2015)eKLR to emphasize that failure to include a certified decree to the record of appeal is not fatal.
 16. The 1st Respondent filed written submissions but only opposed filing of additional evidence on the record of appeal which evidence was not produced before trial. The 1st Respondent only opposed the Applicant's application to that extent.
 17. The 2nd Respondent in its submissions argued that the Applicant's attributed the delay in filing the record of appeal to factors beyond the control of her advocate which factors were not elaborated before this court and the Applicant did not file a certificate of delay to support the fact that the decree was obtained late. It is urged that no reasons were advanced by the Applicant for filing the instant application late. Further, the 2nd Respondent's nominated members being the 3rd and 4th Respondents stands to suffer prejudice since they are unable to discharge their mandate effectively and that the delay is without sufficient cause and is calculated to cripple the 3rd and 4th Respondents from discharging their duties. The 2nd Respondent further submitted that in the event the Applicant's application is allowed, they would be opposing the inclusion of the Certificate of Electronic Evidence to the record of appeal.
 18. The 3rd Respondent in her written submissions argued that this court has discretion to extend time of filing the record of appeal pursuant to Rules 19(1) and 34(10) of the Elections (Parliamentary and County Elections) Rules, 2017. However, the 3rd Respondent will be prejudiced if pages 263-272 of the record of appeal is deemed to be filed since the Certificate of Electronic Evidence was not filed before the trial court and that leave was not sought to file the additional evidence.
 19. The 4th Respondent filed submissions dated 20/06/2021 and argued that the Applicant attributed the delay in filing the record of appeal to matters beyond control of her advocates but failed to disclose those matters. That nothing was attached to the Applicant's application to show that the trial magistrate was on leave and could not sign the decree on time and nothing was attached to disapprove that the decree was signed on 15/02/2023. She submitted that the Applicant has not laid a basis upon which the orders sought can be granted. Reliance was placed on the case of Munuve Mati vs Returning Officer Mwingi North Constituency & Others (2018) eKLR; Hassan Nyanje Charo vs Khatib Mwashetani & 3 others (App. No.15/2014); Peter Gichuki Kingara vs Mary Wambui Munene & 2 others to emphasise that election petition appeals should be filed and determined within strict timelines and that timelines in filing is a vital element in dispensation of justice and that court has discretion to extend time if persuaded that delay was not inordinate.
 20. On Applicant's reliance on Rule 19 of the Elections (Parliamentary and County) Petition Rules, the 4th Respondent submitted that the rule is not coached on mandatory terms and that Article 159 of *the Constitution* cannot aid the Applicant. Reliance was placed on the case of Law Society of Kenya vs Centre for Human Rights and Democracy & 12 others (Petition No. 14 of 2013) where the court held that not all procedural deficiencies can be remedied by Article 159 of *the Constitution*.
 21. That the 4th Respondent will suffer prejudice as she had legitimate expectation to know within the shortest time possible whether to rest her litigious poise and that the Applicant's indolence hurt public interest. The 4th Respondent also objected the inclusion of the documents to the record of appeal that were highlighted in her replying affidavit which documents were not produced during trial.



22. The 5th Respondent in his written submissions argued that the record of appeal was filed out of time without leave of the court and that 21 days provided under the Rules is not subject to extension and the Applicant cannot seek recourse in Rules 4 and 5 which gives court the discretion to give a reprieve to a litigant in the event of failure to comply with the rules. It is submitted that election petitions and appeals operate under stringent timelines. Reliance was placed on the case of Apungu Arthur Kibira v Independent Electoral and Boundaries Commission & 2 Others (2018) eKLR and Supreme Court decision in Lemanken Aramat vs Harun Meitamei Lempaka & 2 others (2014)eKLR.
23. The 5th Respondent further submitted that the Applicant has not made out a case for enlargement of time since the record of appeal was filed late and the decree was not attached rendering that ground otiose. Further, there is no material placed before the court to demonstrate that the Applicant applied for the decree and paid for it and certificate of delay has not been filed to demonstrate that there was delay in obtaining the decree.
24. Counsel further submitted that this being an election appeal, the Applicant bears an onerous burden to proffer sufficient reasons for delay which the Applicant has failed to offer. That the memorandum of appeal was filed on 14/03/2023 and the Appellant had until 05/04/2023 to file the record of appeal. His application for enlargement of time was filed a month later which delay is unexplained. The 5th Respondent urged this court to be guided by the principles that were set by the Supreme Court in Nicholas Kiptoo Arap Salat v IEBC & 7 others (2014) eKLR in considering the application for enlargement of time.
25. I have considered the application, the responses filed by the Respondents and the learned submissions by counsel on record. Arising therefrom, the issues for determination are whether the Applicant has made out a case for the grant of leave to file the record of appeal out of time and secondly whether the annexed record of appeal and supplementary record of appeal be deemed as duly filed subject to payment of court fees.
26. The starting point is Rule 34 of the Elections (Parliamentary and County) Petition Rules, 2017 (the Rules). The memorandum of appeal herein was filed on 14/03/2023 from the date of the judgment which was delivered on 15/02/2023 in compliance with Rule 34(3), the filing of the same was done within the required timelines of 30 days. Sub rule 6 provide 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.”
27. The proviso to Rule 34(6) above stipulates that an appellant shall within twenty-one days upon filing of memorandum of appeal file a record of appeal which shall contain certain specified documents. The Appellant had up to 04/04/2023 to file the record of appeal. The record of appeal has a court receiving



stamp of 04/05/2023 meaning it was filed outside the 21 days stipulated under the Rules and without the leave of this court. The current application was filed on 12/05/2023.

28. Strict timelines for filing election disputes are well provided under the Electoral Laws and *the Constitution*. Addressing this question, the Supreme Court in Lemanken Aramat vs Harun Meitamei Lempaka & 2 Others [2014] eKLR stated that:-

“.. the electoral process, and the electoral dispute-resolution mechanism in Kenya, is marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by *the Constitution* and the electoral law. The jurisdiction of the Court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the Court. This recognition is already well recorded in this Court’s decisions in the Joho case and the Mary Wambui case”.

29. Rule 19 of the Election (Parliamentary and County) Petitions Rules allows the election court to extend time within which anything under the rules may be done in the following terms:-

19.

- (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.

This power is extended to the High Court in exercise of its appellate jurisdiction by Rule 34 (10).

30. It is therefore clear without doubt that in appropriate cases based on the facts and circumstances of each case, the court retains and has the powers, to exercise discretion to extend the time within which, among many other things required to be done within the strict timelines in election laws, a record of appeal is filed.

31. The onus lies on the Applicant to satisfy the court that satisfactory reasons abound to warrant exercise of the discretion in their favour. The applicable principles were laid down by the Supreme Court in the Case of Nicholas Kiptoo arap Korir Salat –vs- Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR where the court set out the principles to be considered in determining whether or not to grant extension of time. This is what the court said:

“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a court should consider in exercise of 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 for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there 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.”
32. The explanation proffered for the delay in lodging the record of appeal by the Applicant as gleaned from her affidavit sworn on 4th May 2023 is that she and her advocates were unable to secure a copy of the decree appealed from since the trial magistrate had proceeded on annual leave and was therefore unavailable to append his signature on the decree. Beyond this bare averment, no evidence of attempts or efforts to secure the decree are demonstrated by way of correspondence to court or otherwise. There is no evidence that the Applicant applied and paid for certified copy of decree and followed up on the same.
33. More importantly, and as would be required where the delay in the filing of a record of appeal is occasioned by the court, no certificate of delay was sought and thus none is filed to support the Applicant’s position.
34. As guided by the Supreme Court in *Salat’s case*, 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. The applicant bears the burden of laying a basis to the satisfaction of the court and where there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
35. It is opportune to reiterate that before this court is an electoral dispute. Based on unsavoury experiences of the past, the people of Kenya deliberately spoke to the question of the conduct of elections dispute resolution in *the constitution* and again in statute through their elected representatives, where among other things, the timelines within which electoral disputes should be determined are set. Parties would in the circumstances be expected to observe the strict timelines and any departure therefrom can only be excused based on cogent reasons. Secondly, electoral disputes carry with them great public interest and affect, not only the parties therein, but the electorate.
36. As correctly submitted by counsel for the Applicant, the court has discretion in the interests of justice to extend time. Further Article 159(d) of *the Constitution* demands that justice shall be administered without undue regard to technicalities. However, Article 159 (d) is not a carte blanche to insulate parties from all manner of procedural breaches. Indeed, it is not a substitute to procedural law and, in my view, the nature of the breach, the culpability of the relevant party and the explanation given must be the guiding factor in establishing whether the breach can be overlooked. The Supreme Court in *Raila Odinga & 5 Others Vs Independent Electoral and Boundaries Commission and 3 others* [2013] eKLR (Raila 2013) at paragraph 218 with respect to Article 159(2) (d) of *the Constitution* stated;

“The essence of that provision is that a Court 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 process of justice is called upon to appreciate all relevant circumstances and the requirements of a particular case, and conscientiously determine the best cause..... [29] It is noteworthy that the phrase “procedural technicalities” in Article 159 (2) (d) is qualified by the preceding phrase “undue regard”. The word, “undue” is defined in the Concise Oxford Dictionary 9th Edition. The first meaning is “excessive, disproportionate”. Thus, Article 159 (2) (d)



cannot be interpreted to mean that all procedural stipulations are to be disregarded in the administration of justice. Certainly, the procedural requirements which facilitate the Courts to function as courts of justice in a particular case are not targeted. The courts have a duty to determine objectively in every case where the question of undue procedural technicality arises whether the procedural stipulation falls in the class of undue procedural technicality and if so, whether it should be disregarded in favour of substantive justice.”

37. In our instant suit the applicant has based her application on an unsubstantiated allegation that the court delayed the decree thus hampering the filing in time of the record of appeal. In what is a clearly contradictory position taken by the Applicant, it is asserted that failure to include the decree in the record of Appeal is not fatal. By so stating, has the Applicant not shot herself in the foot? It is the Applicant’s own submission that the failure to include a decree in the record of appeal is not fatal as held in *Twaher Abdulkarim Mohamed vs Mwathethe Adamson Kadenge & 2 others* (2015)eKLR where it is emphasized that failure to include a certified decree to the record of appeal is not fatal. To my understanding, that is the law so long as the challenged judgement is on record.
38. The Applicant was all along represented by legal counsel and was thus conscious of this now entrenched principle of law in precedent as demonstrated in their submissions. The Applicant cannot lay basis on failure to access a copy of decree as the reason for not preparing their record on time. After all, Courts have allowed incomplete record of appeals depending on the circumstance. (See *Richard Ncharpi Leiyagu vs Independent Electoral and Boundaries Commission & 2 Others* [2013] EKLR). The explanation of the delay is thus not satisfactory to the court.
39. Tied to this conclusion is another aspect of this application which doesn’t seem to have caught significant attention of the parties. The Application itself was filed after some considerable delay. The same (as per records from our E-filing portal) was filed on 8th May 2023 and the physical copy received in court on 12th May 2023, almost a month after the filing of the record of appeal. The delay is not explained; indeed, no attempt is made so to do. Given the strict timelines in electoral disputes, this delay is inordinate. Strangely, the Applicant found it fit to file a supplementary record of appeal before the appeal was regularised and without leave. The Applicant’s indolence portrays a party who was not keen to exercise her right to be heard. On this aspect, the Court of Appeal in *Christopher Odhiambo Karani v David Ouma Ochieng & 2 others* [2018] EKLR stated;

The right to fair hearing as enshrined in Article 50 (1) of *the Constitution* is a cardinal constitutional principle. That provision gives every person a right to have any disputes that can be resolved by the application of the law decided in a fair public hearing before an independent court or body. Further, under Article 25, the right to a fair trial is amongst the fundamental rights which should not be limited. The elements of fair hearing include giving a party in proceedings or a trial a reasonable opportunity to be heard and whether that opportunity has been given depends on the facts of each case. The case of *Alphonse Kondi Riaga versus Commissioner for Cooperative Development* [2016] eKLR cited by the 1st respondent shows that, if a party is given a reasonable opportunity to be heard and does not utilize that opportunity, the only point he can be heard on why he did not utilize the opportunity.⁶⁷

When the Applicant has been given this opportunity, she has fallen short of answering why the record of appeal was filed out of time.

40. I need to say something on the issue whether any prejudice would be caused to the respondents. The 3rd and 4th Respondents have this case hanging over their heads like a sword of Damocles. The delay in the matter is without sufficient cause. The 3rd and 4th Respondents stand to suffer prejudice since they



are unable to discharge their mandate effectively in the offices they now occupy. Just as envisaged in *the constitution* and the election laws the public is entitled to know their representatives soonest after the elections to hold them to account. It is a matter of great public interest and should only be postponed based on clear, cogent and sufficient reasons.

41. On the whole, the Applicant has not achieved the threshold for extension of time. The Application fails and is dismissed and the appeal filed struck out. As this finding disposes of the matter, the 2nd issue for determination becomes moot. On costs, I direct that each party bears its own costs.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 13TH DAY OF JULY 2023

A.K. NDUNG’U

JUDGE

