Gitau v Kenya Methodist University (Kemu (Petition 5 of 2020)
[2021] KEHC 322 (KLR) (8 December 2021) (Ruling)

Neutral citation: [2021] KEHC 322 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION 5 OF 2020

JM MATIVO, J

DECEMBER 8, 2021

BETWEEN

LYNETTE WAMBUI GITAU ..... PETITIONER

AND

KENYA METHODIST UNIVERSITY (KEMU ..... RESPONDENT

RULING

1. On 27th September 2021, this court (Ogola J) struck out the Respondent's Replying Affidavit filed in response to the Petitioner's Petition. He also struck out the Respondent's Advocates Notice of Appointment. Aggrieved by the said order, the Respondent moved this court vide the application dated 8th October 2021, the subject of this ruling seeking leave to appeal and to stay these proceedings pending the hearing and determination of its intended appeal against the said ruling. It also prays for costs of this application and for such further or other reliefs that may be just and expedient.

2. The application is founded on Articles 50 (1), 159 (2), 165 & 259 of the *Constitution* and Rules 3, 13, 19 and 23 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*,[1] section 1A, 1B and 3A of the *Civil Procedure Act*,[2] the inherent jurisdiction of the court, and all enabling provisions of the Law. The grounds in support of the application as gleaned from the supporting affidavit of Njeri Mbugua dated 8th October 2021 are that the Respondent desires to appeal to the Court of Appeal and pending filing and hearing of the appeal, it prays that these proceedings be stayed. It states that its intended appeal has arguable grounds with chances of success, and, that it seeks inter alia determination by the Court of Appeal of several questions. One, whether the impugned decision is legally tenable considering that there was no application for the said orders as prescribed by Rule 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms)

1 Legal Notice No. 117 of 2013.

2 Cap 21, Laws of Kenya.

Practice and Procedure Rules, 2013; two, whether the court could validly issue orders in a vacuum; three, whether the court erred in holding that the Respondent did not enter an appearance within 7 days of filing the Petition since there was no Petition before the court, the same having been dismissed on 30th April 2020; four, whether the Respondent could be condemned for not responding to a non-existent Petition; five, whether the court properly directed itself in striking out the said documents; and, six, whether the alleged infraction amounted to a procedural technicality.

3. Additionally, the Respondent states that it will also ask the Court of Appeal to address the following question:- (i) whether the court entertained peripheral issues at the expense of the Respondent's legal rights; (ii) whether the Respondent can be lawfully denied the right to representation by an advocate without offending the peremptory right to a fair trial; (iii) whether the court erroneously dealt with matters relating to the Petition instead of addressing the reinstatement application dated 28th May 2020 thereby rendering a contradictory decision; (iv) whether the draconian striking out of its documents is compatible with Article 159 (2) of the Constitution and the principles affirmed by the Court of Appeal requiring exercise of great care and caution in striking out of court documents; (v) whether the court could be perceived to have unfairly elevated the Petitioner's case above its cases; and, (vi) whether it is in the interests of justice that the proceedings be stayed pending determination of the intended appeal.

The Petitioner's Response

4. On record is the Petitioner's Replying affidavit dated 15th October 2021. However, the bulk of the affidavit does not address the substance of the application. So far as it is relevant to the application, the deponent deposed that the application is an abuse of court process and that it does not meet the requisite threshold. She also states that the Respondent's failure to file its response within 7 days after service of the Petition was fatal because statutory Timelines are not mere procedural technicalities capable of being cured either by Article 159 of the Constitution, the Oxygen Principal and/or the Overriding Objective as envisaged under the provisions of the *Civil Procedure Act*[3] and/or Civil Procedure Rules, 2010. Further, she avers that the intended appeal has no probability of success and the Respondent is coming to court with unclean hands.

The Respondent's Supplementary Affidavit

5. The Respondent filed the Supplementary affidavit dated 1st November 2021 sworn by Njeri Mbugua in response to the Petitioner's Replying affidavit. The nub of the affidavit is that the Respondent only became aware of this Petition after it was served with the application seeking its reinstatement.

The Respondent's Advocate's Submissions

6. The Respondent's counsel submitted that the application satisfies the tests in *Cassman Brown v Giella*;[4] that the intended appeal is arguable because that it seeks to urge the Court of Appeal to determine the legality of striking out the Notice of Appeal. He submitted that there was no prayer inviting the court to strike out the documents nor was there a Petition at the material time. He argued that the power to strike out pleadings is drastic and is only exercised in rare and deserving cases. Counsel submitted that the Respondent's rights guaranteed under Article 50 of the Constitution are in jeopardy, and that if the proceedings proceed undefended, the Respondent will be prejudiced. He urged the court to exercise its inherent jurisdiction to do justice and underscored the need to allow the Court of Appeal to correct this court's errors.

The Petitioner's Submissions

[3] Cap 21, Laws of Kenya.

[4] {1973} E A

7. The Petitioner's counsel submitted that the Respondent's documents were struck out for being filed without leave, and that the application is not merited. He argued that enlargement of time is a matter of judicial discretion and that statutory timeframes are not mere technicalities capable of being cured under Article 159 of the Constitution or the Oxygen principle. To fortify his argument, he cited *County Executive of Kisumu v County Government of Kisumu & others*[5]in support of the proposition that were time lines are set, the party ought to seek leave otherwise the document filed is of no consequence. He also cited *Nicholas Kiptoo Arap Salat v Independent Electoral Boundaries Commission & Others*[6] in support of the proposition that Article 159 and the oxygen principle did not render statutory timelines otiose. He cited *AMM v Board of Governors*[7] in which the court struck out documents filed without leave and submitted that the documents were filed after 7 months. Further, he relied on *Kenya Power & Lighting Company Ltd v Esther Wanjiru Wokabi*[8] in support of the proposition that the application must be filed without delay and must have an arguable appeal and that it must be in the interests of justice to grant the orders. He argued that the appeal has not met the said threshold.

8. Responding to the submission that there is no prayer in the application, counsel cited *Gideon Konchella v Julius Ole Sunkuli*[9] which held that a replying affidavit is the founding document upon which a party prepares submissions and list of authorities and argued that it her affidavits, the Petitioner asked the court to strike out the Notice of Appointment and the Replying affidavit for being filed late. Further, counsel submitted that it is not in the best interests for this court to stay the proceedings because the stay will be prejudicial to the Petitioner. He invited the court to be guided by *Sheila Cassatt Issenbera & another v Anthony M. Kinyanjui*[10] and submitted that the order being appealed against is not appealable as of right citing section 79G of the *Civil Procedure Act*. He cited *Juma J & 2 others v Patel & another*[11]which held that where a party has not sought leave, the application is dead on arrival and argued that having participated in the proceedings, the Respondent is estopped from saying that there was no Petition and relied on *Sera Njeri v John K. Njoroge*.[12]

9. Acknowledging that a party has the right to legal representation, counsel argued that the right to legal representation must be exercised within the legal framework and that the court must protect both parties. He submitted that the applicant is not entitled to the reliefs sought and urged the court to dismiss the application with costs.

Determination

10. As the outset, it is important to bear in mind that before me is a constitutional Petition expressed under Articles 2, 3, 10, 19, 20, 21, 22, 23, 26, 28, 35, 41, 43, 47, 48, 50, 165 (a), (b) and (d), 258, 259 and 260 of the Constitution and not a proceeding commenced under the Civil Procedure Rules.

5 {2017} e KLR.

6 {2013} e KLR.

7 {2016} e KLR.

8 {2014} e KLR.

9 {2018} e KLR. (SC)

10 {2021} e KLR.

11 {2019} e KLR.

12 {2013} e KLR.

As the Petitioner's counsel pointed out, Constitutional Petitions are governed by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.[13] Notwithstanding the nature of the species of the proceedings before this court, the parties and in Particular the Petitioner deployed a lot of energy invoking provisions of the *Civil Procedure Act*[14] and the Civil Procedure Rules 2010. The applicability of the said provisions in the circumstances of this case are in doubt as explained shortly.

11. On my part, in addressing this application, I will be guided by the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013[15] which govern constitutional Petitions as opposed to the Civil Procedure Rules. A useful point of reference to be kept in mind is the overriding objective of the rules as provided under Rule 3 which is to facilitate access to justice for all persons as required under Article 48 of the Constitution. Also important is the manner in which the rules are to be construed. In this regard, rule 3 (3) provides that the Rules must be interpreted in accordance with Article 259 (1) of the Constitution and shall be applied with a view to advancing and realizing the- (a) rights and fundamental freedoms enshrined in the Bill of Rights; and (b) values and principles in the Constitution. Also relevant is sub-rule 4 which provides that in exercise of its jurisdiction under the Rules, the court shall facilitate the just, expeditious, proportionate and affordable resolution of all cases.

12. Talking about the overriding objective of the Rules and the requirement for courts to determine cases without undue regard to procedural technicalities, it is important at this stage to attempt to define the term a "legal technicality." This phrase has been defined as follows:[16]

> " Legal technicality" is a casual or colloquial phrase referring to a technical aspect of law and that it is not a term of art in the law, has no exact meaning and doesn't have a legal definition. That notwithstanding, the term implies that strict adherence to the letter of the law prevents the spirit of the law from being enforced and is often simply used to denote any portion of the law that interferes with the outcome desired by the user of the term."

13. The court in *James Mangeli Musoo v Ezeetec Limited*[17] preferred the following definition:

> " A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute."

13 Legal Notice No. 117 of 2013.

14 Cap 21, Laws of Kenya.

15 Legal Notice No. 117 of 2013.

16 Musembi Emmanuel Nzak, Due Regard versus Undue Regard To Procedural Technicalities: The Civil Procedural Tug-Of-War Technicality, citing Dictionary for US, http://dict.us/technicality accessed on 29 January 2016.

17 {2014} e KLR.

14. The *House of Lords in Henry JB Kendall & Others v Peter Hamilton*[18] had this to say: -

> " Procedure is but the machinery of the law after all, the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to sub serve"

15. In *Anchor Limited v Sports Kenya*[19] the court while searching for a fitting definition of procedural technicalities had this to say: -

> "
>
> " 10. One workable and pragmatic definition of a technicality has been bequeathed to us by the Learned Honourable Justice Richard Mwongo, in Kenya Ports Authority V Kenya Power & Lighting Co. Limited (2012) eKLR and another one supplied by the Learned Hon. Justice C.W Githua in James Muriithi Ngotho & 4 Others V Judicial Service Commission (2012) eKLR: both decisions substantively say that procedural technicality is a lapse in form that does not go to the root of the suit. In the former case, Justice Mwongo defined a technicality thus:
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> Combining the meanings of these words, "procedural technicalities" may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all-encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended."

16. Whatever definition we adopt, courts are constitutionally obligated to adopt an approach which prefers determination of cases on merits as opposed to procedural technicalities. Simply put, to be preferred is an approach that places emphasis on merits as opposed to undue technicalities. Courts should critically examine the meaning of the "on the merits," how the principle has permeated our procedural theory and architecture, courtesy of our transformative, liberal and progressive Constitution and why, despite the allure of the procedural rules, we should prefer the "determination on the merits" principle.

17. Perhaps, I should clarify that a resolution "on the merits" occurs when a lawsuit is decided according to procedural rules that (1) are designed, interpreted, and implemented to give the parties a full opportunity to participate in presenting the proofs and reasoned arguments on which a court can decide a case, and (2) do not systematically affect the outcomes of cases due to the intended operation of a principle other than the principle of allowing the parties a full opportunity to participate. A pertinent question as I see it raised in the instant application meriting determination by the Court of Appeal is whether the impugned order offends the "determination on merit principle" and the requirement to hear both parties. One thing is beyond argument, that is, the principle of resolving cases on their merits is now deeply ingrained in our Constitution. It's now constitutional canon. It's no longer a mere common law principle. Major aspects of the procedural laws both criminal and civil

[18] He111)1JB Kendall & Others v Peter Hamilton (1878) 4 AC 504.

[19] {2017} e KLR.

flow directly from the constitutional dogma that parties deserve a full opportunity to participate in shaping decisions about their claims and defenses. I am persuaded beyond peradventure that on this one ground alone, the Respondent's intended appeal is not only arguable but it presents pertinent constitutional questions meriting determination by the Court of Appeal.

18. The other reason why I am persuaded that the intended appeal raises arguable grounds also flows from the Constitution. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013[20] were promulgated pursuant to Article 22 of the Constitution to enforce the Bill of Rights. Perhaps I should mention that Article 19 of the Constitution provides: -

> 19. Rights and fundamental freedoms
>
> (1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.
>
> (2) The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.
>
> (3) The rights and fundamental freedoms in the Bill of Rights—
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> (a) belong to each individual and are not granted by the State;
>
> (b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter; and
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> (c) are subject only to the limitations contemplated in this Constitution.

19. Courts are required to hoist high the fundamental rights and freedoms. The rights implicated in this application include, but not limited to access to justice, (Article 48), the right to have a dispute determined by an impartial and independent court (Article 50 (1)), the right to legal representation, and the constitutional dictate to uphold the values and principles in the Constitution. By now, it is clear that the approach largely adopted by the Petitioner in opposing the application substantially citing the *Civil Procedure Act*, the Civil Procedure Rules, 2010 and the authorities largely decided in civil suits as opposed to constitutional Petitions is not the correct approach. To be preferred is an approach that will have due regard to the rules governing constitutional Petitions and in particular, the overriding objective of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. It will suffice to say that as dictated by Article 159 and the overriding of the rules, courts should frown invitations to determine cases on procedural technicalities, thereby lifting procedure over substance.

20. Stay of proceedings is not alien to constitutional Petitions. It is expressly provided under Rule 32 in the following words :-

> Stay pending appeal. 32.
>
> (1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.

[20] Legal Notice No. 117 of 2013.

(2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.

(3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.

21. The impugned ruling was rendered on 27th September 2021. This application was filed on 8th October 2021 within 14 days as stipulated in the above rule. The applicant filed a Notice of Appeal on dated 8th October 2021, after a delay of 5 days. The question is whether the delay in filing the Notice of appeal is inordinate.

22. It is important to mention that the right to appeal is not automatic but a creation of the statute. This position has been appreciated by the Supreme Court in several decisions. In *Nyutu Agrovet Limited v Airtel Networks Kenya Limited: Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*[21] the Apex court stated that a right of appeal is not automatic but is a creation of statute and the jurisdiction to grant leave to appeal is only excised where the right of appeal exists. Thus, an applicant for leave must show that the intended appeal raises substantial questions of law to be decided by the appellate court and that the intended appellant has a bona fide and arguable case. The applicant must demonstrate the issues raised or involved are of general principle(s) which are to be decided for the first time or where the question(s) is one upon which further argument and a decision of the superior court would be to the public advantage. However, it is useful to emphasize that much as the right of appeal is not automatic but a creation of a statute, provisions providing for the right of appeal must be viewed from the prism of the Constitution, particularly the right to access justice and the right to have a dispute determined by the court.

23. The Petitioner's counsel submitted that failure to comply with statutory timelines is not s procedural technicality. Much as the said reasoning is attractive, before me is not a determination of the question whether the Respondents failure to file the Replying affidavit in time (if it was late) amounts to a procedural technicality. That is an issue to be determined by the appellate court. Before me is a simple question, whether the Respondent has established grounds to warrant to the leave and stay sought. The Supreme Court *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*[22] set out the considerations to guide the court in exercising its discretion in cases of this nature. It stated: -

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 for extension of time has the burden of laying a basis to the satisfaction of the court

iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;

iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

21 {2019} e KLR.

22 {2014} e KLR.

v. Whether there will be any prejudice suffered by the respondents if the 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."

24. In granting leave, the court has to balance the competing interests of the applicant with those of the respondent, a position well stated in the following paragraph extracted from M/S *Portreitz Maternity v James Karanga Kabia*:-[23]

> " That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right."

25. Decided cases are in agreement that delay, even for one day must be satisfactorily accounted to the satisfaction of the court. In the instant case, as stated above the instant application was filed before the expiry of the 14 days provided by the rules. The Notice of Appeal was late by 5 days. The thirty days provided for filing the appeal lapsed during the pendency of this application. I find and hold that the 5 days delay in filing the Notice of Appeal is not inordinate.

26. The other consideration is whether the applicant has an arguable appeal. Earlier in this ruling I observed that a pertinent question meriting determination by the Court of Appeal is whether the impugned order offends the "determination on merit principle" and on that ground I held that this application succeeds.

27. Other questions meriting consideration by the Court of Appeal include whether the court misdirected itself by striking out the Respondent's Replying affidavit and Notice of Appointment. It should be recalled that decided cases are in agreement on the applicable principles to guide the courts in striking out pleadings. These principles were set out with sufficient clarity in *D T Dobie & Company (K) Ltd v Muchina*.[24] Striking out pleadings is a drastic step which should be a measure of last resort and even then, in rare and extremely exceptional cases. No party should be driven out of the seat of justice without a plenary hearing except in extremely deserving cases. Whether this case falls into the category of rare and deserving cases is an arguable point of law meriting determination by the Court of Appeal.

28. Another ground for resolution by the Court of Appeal is whether even if the affidavit was filed late, whether the omission could have been cured by a lessor draconian measure. The Court of Appeal will determine whether the Respondent's affidavit disclosed a semblance of a cause of action, and whether it was possible to inject the Respondent's case with real life by amendment by a court order deeming it to be properly filed instead of closing the doors of justice to a party who is already in court. Also pertinent is the question whether or whether by closing the door to one party, a court of justice will be acting in darkness without the full facts of a case before it and quality of justice emanating from such a decision.

29. The rationale for above reasoning is due to a realization that the exercise of the powers of summary procedure are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court exercises those powers with the greatest care and circumspection and only in

23 Civil Appeal No. 63 OF 1997.

24 {1982} KLR 1.

the clearest of cases as regards the facts and the law. Simply put, it will be an opportunity for the Court of Appeal to determine whether this was one of those rare and clear cases where such draconian orders are justified. It is settled law that the summary procedure should only be adopted when it can be clearly seen that a claim or case is clear and beyond doubt unarguable. This becomes clear if we appreciate that the judicial system would never permit a party to be driven from the judgement seat without any court having considered his right to be heard, except in cases where the cause of action was obviously and almost incontestably bad. To me, this is a fertile ground for the Court of Appeal to address.

30. In *Madison Insurance Company Limited v Augustine Kamanda Gitau*[25] the court stated: -

> 11. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless of fanciful and or is brought is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

31. Other pertinent grounds are whether striking out the advocates Notice of Appointment deprives the Respondent the right to be represented by an advocate of his choice, whether the decision is an affront to the constitutional right to be heard and access to justice. To me, these are arguable grounds for the Court of Appeal to determine.

32. Granting or refusing to grant the orders sought is a matter of judicial discretion. The Court of Appeal will address the question whether the court properly exercised its discretion. The classic definition of `discretion' by Lord Mansfield in R. v Wilkesn[26] is that `discretion' when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, `but legal and regular'. In exercise of discretion, the court cannot ignore the provisions of the Constitution or the law. In fact, discretion follows the law. The King's Bench in Rookey's Case[27] stated as follows: -

> " Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."

25 {2020} e KLR.

26 1770 (98) ER 327.

27 [77 ER 209; (1597) 5 Co.Rep.99].

33. As stated earlier, the discretionary powers of the court are constrained by the objectives of the Constitution to grant access to justice. Access to justice is both ways. One, the Petitioner's right to prosecute her case. Two, the Respondent's right to appeal against the decision. 'Discretion' signifies a number of different legal concepts. Here the order is discretionary because it depends on the application of a very general standard— what is 'just and equitable' — which calls for an overall assessment in the light of the factors mentioned in the Constitution or a statutory provision, each of which in turn calls for an assessment of circumstances. (See Norbis v Norbis[28]).

34. Because the above assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends. To me, there is nothing arbitrary or capricious in exercising a discretion in order to give effect to an express constitutional or statutory provision and more so, when the provision gives effect to a fundamental right. The right to access justice is guaranteed under Articles 48 of the Constitution. All law must conform to the constitutional edifice.

35. Broadly speaking, the exercise of the court's discretionary power is influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before it. Flowing of my discussion above, it is my conclusion that this is a proper case for the court to grant the leave and stay sought. Consequently, I allow the application dated 8th October 2021 and order as follows: -

    a. That the Respondent is granted leave to file its appeal out of time.

    b. That the Notice of Appeal dated 8th October 2021 be and is hereby deemed as properly filed.

    c. That the intended appeal shall be filed within 45 working days. In computing the said period, the period between the 21st December 2021 and 13th January 2022 shall be excluded.

    d. That pending the filing, hearing and determination of the said appeal, these proceedings be and are hereby stayed.

    e. That in the event of failure to file the appeal within the above stipulated period, the orders herein granted shall lapse.

    f. No orders as to costs.

Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 8TH DAY OF DECEMBER 2021

JOHN M. MATIVO

JUDGE

[28] [1986] HCA 17; 161 CLR 513; 60 ALJR 335; 65 ALR 12.