

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
MISC. CIVIL APPLICATION NO.E050 OF 2024
(Formerly Nairobi HCMISC No.E856 of 2024)

LYDIA CHELIMO KIBOI.....
APPLICANT

VERSUS

FORUM FOR RESTORATION OF
DEMOCRACY KENYA (FORD KENYA).....1ST
RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES
COMMISSION (IEBC).....2ND
RESPONDENT

MARJAN HUSSEIN MARJAN.....3RD
RESPONDENT

CHRISANTUS WAMALWA WAKHUNGU.....4TH
RESPONDENT

STEPHEN NAMUSYULE.....5TH
RESPONDENT

JOHN KENNERY WANYAMA.....6TH
RESPONDENT

DAVID MUCHELULE.....7TH
RESPONDENT

PHYLISS WANGWE.....8TH
RESPONDENT

ANN KHAKASA SITUMA.....9TH
RESPONDENT

RULING

1. Lydia Chelimo Kiboi, the applicant herein has moved this court vide a Notice of Motion dated 12/9/2024 for leave to appeal out of time against the Ruling of Political Parties Disputes Tribunal (PPDT) delivered on 1/7/2024.
2. The applicant has listed the following grounds for the prayer sought;
 - (a) That the ruling, the subject of this application was delivered virtually on 1/7/2024.**
 - (b) That the applicant wrote asking for certified copies of proceedings and ruling on 24/7/2024.**
 - (c) That the certified copies of proceedings and ruling were supplied on 26/8/2024 making it hard for her to study the ruling and draw a memorandum of appeal.**
 - (d) That Political Parties Disputes Tribunal issued certificate of delay on 11/9/2024.**
 - (e) That the delay in lodging the appeal outside the 30 days statutory period was not inordinate and the same is excusable in her view.**
 - (f) That with the proceedings ready the applicant undertakes to file the appeal and the record within shortest time possible.**
 - (g) That the respondents will suffer no prejudice.**
3. The application is supported by an affidavit sworn by Sylvester Mbithi Advocate on 12/9/2023 where he has reiterated the above grounds. He contends that a delay of one month 12 days is not inordinate and is excusable to them. He avers that granting the prayer sought would be in the interest of justice.
4. In her written submissions dated 1/7/2025 done through learned counsel M/s JGS Law-LLP Advocates submits that the

subject ruling was delivered virtually online on 1/7/2024 and a copy thereof was not available to the applicant until 4/9/2024 which was approximately 2 months and 3 days later and by which time the time to lodge an appeal had lapsed.

5. She contends that without a copy of the ruling it was impossible to seek instructions and draft a memo of appeal within the statutory timeline which made the applicant lodge this application.
6. She faults the 9th respondent for opposing this application just to enable her enjoy the fruits of what she terms flawed decision of Political Parties Disputes Tribunal and drive her out of the seat of justice.
7. She submits that the delay of not filing the appeal out of time was caused by circumstances beyond her control and cannot be attributed to her.
8. She further contends that even if she was responsible a delay of a month is not inordinate to drive her out of the seat of justice because the delay in her view is excusable. She relies on the following decisions to buttress her case;
 - (i) *Nyasani -vs- Ochieng (2025) KEHC 3464 KLR*
 - (ii) *Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 7 Others (2014)eKLR and*
 - (iii) *Thuita Mwangi -vs-Kenya Airways Ltd (2003)eKLR.*

9. She asks this court on the strength of the above decisions to allow her a chance to ventilate her appeal.
10. The respondents named in this application filed separate responses to the application and I will consider the objections as filed or in no particular order.
11. The 7th respondent David Muchele vide a replying affidavit sworn on 24/10/2024 has opposed this application.
12. In the first place he says the person sued as David Muchelule and Chairman of National Election Board of FORD-Kenya is not him, because he resigned from that seat.
13. He avers that the applicant has no automatic right of appeal against a negative order and needed to have sought leave from Political Parties Disputes Tribunal.
14. That the impugned ruling from Political Parties Disputes Tribunal does not constitute an order falling under Section 75(i) of the Civil Procedure Act or Order 43 (1) of the Civil Procedure Rules where an appeal lies as of right.
15. He faults the applicant for indolence in requesting certified copies of the ruling and proceedings after the ruling was delivered. He relies on the decision of **Njage Njeru -vs- Karija K Mugambi (2021)eKLR** where the court held that filing an appeal is different from filing the record of appeal which would require typed proceedings and that an advocate can peruse through a judgment, file an appeal and later file amendments if need arises.

16. He contends that the applicant chose to sleep on her rights instead of filing her appeal when she had the chance to do so, adding that the ruling was delivered on 1/7/2024, which means the applicant had upto 31/7/2024 to prefer an appeal but went quiet until 24/7/2024 without notifying the respondents when she requested for typed proceedings.
17. The 7th respondent further contends that the applicant's chances in the intended appeal are nil because to him the appeal is not arguable in light of the decision in Kitale High Court Petition Appeal No.E002 of 2023 between the 9th respondent and others -vs- Lydia Chelimo Kiboi.
18. That the applicant intends to reopen and vary an order of a court of equivalent and concurrent jurisdiction.
19. The 7th respondent contests the applicant's view that no prejudice would be occasioned if her application is allowed arguing that costs would be occasioned.
20. He avers that the intended appeal is mischievous, contemptuous and an abuse of judicial process.
21. In joint written submissions dated 7/10/2025 done through M/s Millimo, Muthomi & Co Advocates, the 4th, 7th and 8th respondents take the position that an appeal cannot be filed in a miscellaneous application and that a party can only seek leave to appeal out of time in an already filed appeal and in that regard they rely on the decision of **Nginyanga Kavole -vs- Mailu Gedion (2019)eKLR** and **Gerald M'limbine -vs- Joseph Kanyangi (2009)eKLR**

where the courts made the same observations citing the provisions of Section 79G of Civil Procedure Act.

22. The respondents submit that the applicant has not filed a memorandum of appeal as stipulated under Section 79G of the Civil Procedure Act.
23. They contend that they have been greatly prejudiced as they got the false impression that the matter had been concluded only to be ambushed later after almost 2 months with the present application.
24. They rely on the Court of Appeal decision in the case of **Daniel Nkirimpa Monirei -vs- Sayialel Ole Koilel and 4 Others (2018)eKLR** where the Court of Appeal struck out an appeal on grounds that a valid Notice of Appeal had not been filed prior to the filing of memorandum of appeal and that the issue was not a mere procedural technicality curable by invoking the overriding principle.
25. They contest the contention by the applicant that the delay is not inordinate. They submit that the reasons for the delay for not filing appeal on time are not well explained. They rely on the case of **Charles Mwangi Kiiru -vs- Bonface Maina Gichomo & Joseph Mwangi Thuo (2021)eKLR** where the court held that a delay of 2 ½ months was inordinate because a delay of even a day can be inordinate depending on circumstances. They have cited the decision of **Rajesh Rughani -vs- Fifty Investments Ltd & Anor (2016)eKLR**.

26. The 1st to 5th respondents have equally opposed this application through a replying affidavit sworn on 27/9/2024 by Stephen K Namusyule, the 5th respondent herein.
27. They aver that this court lacks jurisdiction to entertain this application because the Political Parties Disputes Tribunal's decision which is the subject of this decision was made in Eldoret and in their view this application should have been filed in Eldoret.
28. They have reiterated the grounds raised by the 7th respondent in his replying affidavit. They aver that a party seeking discretion of the court must demonstrate due diligence and reasonable cause for the delay. They fault the applicant for demonstrating none of this.
29. They further reiterate that the intended appeal is of no legal consequence because this court in Election Petition Appeal No.E002 of 2023 set aside the magistrate's decision affirming that the Election Court lacked jurisdiction and held that the 9th respondent stood duly elected. They submit that the decision in that appeal is binding and the applicant cannot attempt to re-litigate the same through an appeal.
30. In their written submissions through learned counsel M/s Millimo, Muthoni & Co Advocates dated 6/10/2025, the 1st to 5th respondents submit that an applicant who seeks to appeal out of time should meet the threshold set in **Nicholas Kiptoo Korir Arap Salat -vs- IEBC & 7 others (2014)eKLR** where the Supreme Court inter alia observed

exercise of court's discretion to extend time is to be made on a case to case basis but the reasons for delay should be explained to the satisfaction of the court adding that the application for extension should be brought without undue delay.

31. They submit that under Section 79G of Civil Procedure Act, the applicant had 30 days from 1/7/2024 to file her appeal and that certified proceedings were of little relevance to the preparation of memorandum of appeal because the applicant had knowledge on the contents of the impugned ruling because the same was delivered in presence of her advocate. They rely on **Paul Njage Njeru -vs- Mugambi (2021)eKLR** where the court found that the typed proceedings are important for filing record of appeal.
32. The 1st to 5th respondents submit that the intended appeal has little chance of success because most of the issues raised were determined vide Kitale Election Appeal No.2 of 2023.
33. The 9th respondent, Ann Khakasa Situma has also weighed in by opposing the application through a replying affidavit sworn on 28/10/2024.
34. The 9th respondent avers that she was not a party to the initial Political Parties Disputes Tribunal case No.10 of 2022 but the applicant has enjoined her in this application without leave.

35. She avers that this application seeks orders based on illegality in view of the decision of Election Petition No.E002 of 2023 which dealt with the issues of her nomination by 1st respondent.
36. In her written submissions dated 30/12/2024 the 9th respondent joins hands with the submissions dated 12/9/2024 by Milimo, Muthomi & Co Advocates adding that election disputes are disputes which ought to have been determined expeditiously. She contends that the judgment in Kitale High Court Election Petition Appeal No.2 of 2023 affirmed her election to the County Assembly of Trans-Nzoia and that any attempt to appeal the decision of Political Parties Disputes Tribunal is now overtaken by events.
37. This court has set out the applicant's case as well and the objections raised by the respective respondents.
38. This is an application for leave to file an appeal out of time. Extension or enlargement of time to carry out an activity or take any action that is time bound is a discretionary matter for a trial court.
39. The applicant has not brought out clearly the background of this matter but the 9th respondent has done commendably well in bringing out the background or genesis of the dispute which is well captured by the decision of Hon Mrima J in Election Petition Appeal No.2 of 2023 where the 9th respondent herein as well as the 1st and 2nd respondents

were appealing against the decision of an Election Court in Kitale CM's Court No.001 of 2022.

40. The applicant herein being a member of the 1st respondent herein applied to her party for inclusion of her name in the Trans-Nzoia County Assembly Gender Top-Up List category for purposes of nomination. The same was done but when the Independent Electoral & Boundaries Commission (IEBC) published the Political Parties Nomination List the applicant's name was included in the Bungoma County Gender Top-Up List not the Trans-Nzoia County List.

41. It is apparent that the applicant tried to have the error rectified from her own party citing that she was from Trans-Nzoia and not Bungoma but the 5th respondent herein declined on grounds that the name had already been submitted to the Independent Electoral & Boundaries Commission. The applicant escalated the matter to Political Parties Disputes Tribunal explaining her predicament and the Political Parties Disputes Tribunal found in her favour and directed FORD-K to amend its Bungoma County Assembly Party List by deleting the applicant's name and inserting her name in the Trans-Nzoia Party List to be forwarded to the Independent Electoral & Boundaries Commission for nomination.

42. That directive was not carried out and the applicant instituted Election Petition No.1 of 2022 against both FORD-Kenya and the Independent Electoral & Boundaries

Commission for failure to comply with Political Parties Disputes Tribunal's decision. The 1st respondent herein among other issues raised challenged the jurisdiction of the Elections Court while the Independent Electoral & Boundaries Commission absolved itself from blame stating that it did not receive any amended Gender Top-Up List from FORD-K as directed by Political Parties Disputes Tribunal in its judgment.

43. In brief, the Election Court found in favour of the applicant vide its judgment delivered on 20/3/2023 and found that it was seized with jurisdiction and found that the Party List was not generated in accordance with the law. It went ahead and found that the allocation of the Seat to the 9th respondent herein was null and void and quashed it and ordered FORD-K to re-constitute Gender Top-Up List within 60 days of the judgment.

44. The 9th respondent as well as 1st and 2nd respondents herein preferred an appeal vide Kitale Election Petition Appeal No.E002 of 2023 citing lack of jurisdiction of the Election Court and other issues touching on merit of the decision. The court presided by Mrima J vide its decision dated 1/8/2023 found in favour of the appellants who are the 1st, 2nd, and 9th respondents herein and found that the Election Court lacked jurisdiction to entertain the dispute as it was a pre-election dispute and there were adequate mechanisms under Political Parties Act to pursue her

grievances or file a Judicial Review or invoke the supervisory powers of this court under Article 165(3). The court found that the 9th respondent stood elected as Member of County Assembly of Trans-Nzoia by way of nomination vide FORD-K Gender Top-Up List and set aside the decision of the Election Court in the lower court.

45. The applicant chose to move to the Political Parties Disputes Tribunal vide a complaint No.E010/2022 through a Notice of Motion dated 29/1/2024 seeking to inter alia commit the Chief Executive Officer (CEO) of Independent Electoral & Boundaries Commission Mr Marjan Hussein and Hon.Moses Masika Wetangula the Party Leader of FORD-Kenya among other officials to civil jail for failure to comply with Independent Electoral & Boundaries Commission earlier decision of 8/8/2022 requiring FORD-Kenya to amend their Gender Top-Up Party List to include the applicant herein. The applicant also sought to nullify the election of the 9th respondent by FORD-Kenya. The Political Parties Disputes Tribunal in its decision dated 1/7/2024 found that it could not nullify the election of 9th respondent because she was already a Member of County Assembly and it lacked the jurisdiction because of the operation of Section 75(1A) of the Elections Act and Rule 6 of Election Petition Rules that gave jurisdiction to Resident Magistrate designated by the Chief Justice of Kenya. On the question of contempt, the Tribunal found that FORD-Kenya complied with its order because it

wrote to Independent Electoral & Boundaries Commission and de-listed the applicant from Bungoma Gender Top-Up List and included her in Trans-Nzoia Gender Top-Up List. The Tribunal found no merit in the application and dismissed the application.

46. It is that dismissal that is now the subject of this application.

47. As I have already observed above, extension of time is a discretionary matter. The guidelines for the exercise of that discretion to extend time is well illustrated in the cited Supreme Court decision in the case of **Nicholas Kiptoo Korir Salat -vs- IEBC & 7 Others (2014)eKLR** where the court underscored the underlying principles which should be considered in exercise of discretion to extend time as follows;

- (i) That extension of time in itself is not a right of any party. That extension is an equitable remedy that is only available to a deserving party at the discretion of the court.***
- (ii) That a party seeking for extension of time has the burden of laying basis to the satisfaction of the court.***
- (iii) That the decision 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 and that the reason should be explained to the satisfaction of the court.***
- (v) Whether extension would prejudice the respondent.***

(vi) Whether the application for extension has been made without undue delay.

48. This court has considered the major reason given by the applicant in seeking for enlargement of time to challenge the decision of the Political Parties Disputes Tribunal. While it is well settled that in civil case time for filing appeal is 30 days from the date of the judgment or ruling to be appealed from as provided under Section 79G of the Civil Procedure Act, the applicant did not prefer any appeal within the prescribed time. The main reason given is that she was not able to obtain a copy of the Ruling on time. The impugned decision was delivered on 1st July 2024. The applicant therefore had upto 31/7/2024 to prefer an appeal if she so wished but did not because she says she did not get proceedings as well as the Ruling on time. That she applied for the same on 24/7/2024 and the Political Parties Disputes Tribunal supplied the same on 26/8/2024.
49. The question raised is, if the applicant was present through counsel on 1/7/2024 when the ruling was delivered why did it take her more than 3 weeks to apply for proceedings and Ruling?. That is not explained at all in this application. Secondly did she really require typed proceedings and Ruling to file an appeal well aware that filing an appeal was time bound? The answer to that question is in the negative in my view because the applicant has not stated with certainty that she was unable to obtain a copy of the Ruling after its delivery on 1/7/2024. Election

matters are strictly time bound and have to be dealt with expeditiously because of the potential implications. It can potentially remove one or place a different person in an elective post and that is why the electoral laws are very strict on timelines given.

50. This court further takes the position in the case of **Paul Njage Njeru -vs- Kanja K Mugambi (2021)eKLR** that a litigant really does not need to secure a copy of proceedings to file an appeal or decide to challenge a decision. Filing an appeal does not require typed proceedings which are required in preparation of record of appeal. A party is given liberty to even amend the grounds of appeal at a later stage if at time of preparing the record of appeal he/she notices that perhaps there is an important ground left out in the memorandum of appeal or need to amend a ground raised to ensure that all the grievances are well captured.

51. This court is not persuaded that a party can sleep and after the time prescribed to appeal is over start scampering for reasons to explain delay such as lack of typed proceedings or mistake by counsel. An applicant is required to demonstrate good faith and diligence in pursuing for his/her right to appeal. This is because enlargement of time is an equitable remedy and equity goes to the vigilant not the indolent. A delay is a delay. A party is duty bound to explain even a delay of one day. Delay should not be taken for granted.

52. This court finds the objection raised by the respondents that the applicant was required to appeal first and seek leave later pursuant to Section 79G to be a technicality. A party in my considered view can either file a miscellaneous application seeking enlargement of time and upon leave being granted can then lodge the appeal out of time pursuant to the leave granted or file the appeal then seek leave to have the same admitted out of time as submitted by the respondents.

53. The present application is therefore competently filed before this court. I also do not find merit in the ground that it should have been filed in Eldoret High Court. This court and Eldoret High Court exercise concurrent jurisdiction and one cannot argue that one has jurisdiction as opposed to the other. The subject matter of the dispute, which is a Seat reserved for political parties, to make nomination to the Top-up Gender equation is within the geographical jurisdiction of this court. This court is therefore well seized of the matter.

54. However on the question of merit or substance of application, I find that the application has failed to meet the threshold required to make me exercise discretion in her favour. The issue of nominations of Party List in respect to 2022 General Elections is now water under the bridge and clearly overtaken by events. For all practical purposes, political parties are now gearing up for 2027 General Elections which is only a year ahead. The applicant should be

sparing her energies for the political fights ahead rather than looking backwards. This finding however is made in obiter. Suffices to state that this court finds no merit in the application dated 12/9/2024. I will however make an order as to costs so each party to bear own costs.

DELIVERED, DATED and SIGNED at KITALE this11th day ofMAY....., 2026.

HON JUSTICE R.K. LIMO
KITALE HIGH COURT

Ruling delivered in open court

In the presence of

Mbithi for the Applicant

Nyamu for the 9th Respondent

Wafula for the 1st and 4th Respondents

Duke/Chemosop- court assistants