



REPUBLIC OF KENYA



KENYA LAW

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Ndumba v Returning Officer Kimilili Constituency & another (Civil Application E001 of 2024) [2024] KECA 220 (KLR) (27 February 2024) (Ruling)

Neutral citation: [2024] KECA 220 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E001 OF 2024**

HA OMONDI, JA

FEBRUARY 27, 2024

THE MATTER OF THE CONTRAVENTIONS OF PROVISION OF RULES 4 AND 10 OF THE CONSTITUTION (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOM PRACTICE AND PROCEDURE RULES 2013). AND IN THE MATTER OF THE CONTRAVENTION, THREATENED CONTRAVENTION AND VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 3(1), 10, 38(3), 8 L(D), 83(2), 86, 88(4) AND 159 OF THE CONSTITUTION OF KENYA 2010. AND IN THE MATTER OF SECTIONS 3, 4, 5, 6, 7, 8, 25 OF THE ELECTION ACT 2011 AND ELECTION REGULATION 2012.

AND IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013. AND IN THE MATTER OF INTERPRETATION, ENFORCEMENT AND PROTECTION OF THE BILL OF RIGHTS UNDER ARTICLES 19, 20, 22, 23, 28, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA 2010.

AND IN THE MATTER OF SECTIONS 6(D), (), (M), 17(B), (C), 8 OF THE ELECTION OFFENCES ACT NO. 37 OF 2016.

BETWEEN

PIUS SIMIYU NDUMBA APPLICANT

AND

RETURNING OFFICER KIMILILI CONSTITUENCY 1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND RESPONDENT

(An application for extension of time to file and serve Memorandum and Record of Appeal against the ruling of the High Court of Kenya at Bungoma (R. E. Ougo, J.) dated 6th October 2023 in Constitutional Petition No. E010 of 2022)



RULING

1. The application dated 21st December 2023 is brought pursuant to rule 4 *Court of Appeal Rules*, 2010, seeking extension of time to file and serve the Memorandum and Record of Appeal against the ruling in Bungoma Constitutional Petition No. E010 of 2022 (Ougo, J.), delivered on 6th October 2023; and that costs be provided. The application is supported by an affidavit of even date sworn by the applicant, Pius Simiyu Ndumba.
2. In preparation for the last general elections of August 2022 the applicant had embarked on his campaign as the duly elected Orange Democratic Movement (ODM) candidate for the seat of Member of County Assembly Maeni ward, having been issued with a certificate of registration and a sample ballot paper; only to discover that his name was not in the Voters Register. He thus filed Bungoma Constitutional Petition No. E010 of 2022, where he sought a declaration that his fundamental rights and freedoms as a voter and candidate were violated as a consequence of his name missing from the Voters Register, directions to the respondents to reaffirm his name in the said register; and special damages Kshs.6,690,000/-.
3. However, before the petition could be heard, the respondents raised a preliminary objection on grounds that the petition was incompetent for want of the court's jurisdiction. The preliminary objection was sustained by a ruling delivered on 6th October 2023, and the petition was struck out. The applicant being dissatisfied with the outcome, lodged an appeal, and also the present application.
4. On the same day the applicant applied for certified copies of proceedings; filed and served the Notice of appeal on 16th October 2023; however, the certified copies of proceedings and ruling were only supplied on 6th December 2023; and a certificate of delay dated 11th December 2023 issued. As a result, there was delay in filing the appeal as well as the record of appeal within the stipulated period; and the applicant explains that the delay was not deliberate but was beyond his control; that in any event, the application has been made without undue delay. He describes the appeal as having good chances of success.
5. Has the applicant met the prerequisites for granting relief under Rule 4 of the *Court of Appeal Rules*? Rule 4 of the Court of Appeal Rules gives the court unfettered discretion in deciding whether to grant an applicant extension of time to do a particular prescribed action. In *Leo Sila Mutiso vs. Rose Wangari Mwangi* Civil Application No. Nai. 255 of 1997 (unreported) held that the discretion of a single judge under Rule 4 is wide and unfettered. This discretion however must be exercised judiciously and upon reason, rather than arbitrarily, capriciously on a whim or sentiment as was held in *Julius Kamau Kithaka vs. Waruguru Kithaki & 2 Others* (2013) eKLR.
6. M'Inoti, J, had this to say concerning Rule 4 in *Imperial Bank (IR) & Anor vs. Alnashir Popat and Others* [2018] eKLR:

“A look at legislative history of Rule 4 will show that before 1985 the rule required that an applicant to show ‘sufficient reason’ why discretion should be exercised in his favor. After an amendment in 1985 that ‘sufficient stricture’ was removed, and the court was henceforth allowed to extend time on such terms that it deemed just. As subsequent decisions show, the amendment did not mean that the court will extend time merely on the asking. The party seeking extension of time must establish basis upon which court should exercise its discretion in its favor.”



7. Discretion also depends on circumstances of each case as per *Mongira & Another vs. Makori & Another* [2005] eKLR. The Supreme Court has settled principles to guide in exercise of discretion to extend time. The case of *Nicholas Kiptoo Korir Arap Salat vs. IEBC* [2014] eKLR sets down these principles as follows:

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- i. Extension of time is not a right to 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 basis to the satisfaction of the court.
- iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by- case basis.
- iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
- v. Whether there will be any prejudice suffered by the respondent if extension is granted.
- vi. Whether the application has been brought without undue delay.
- vii. Whether in certain cases public interest should be a consideration for extension of time.

One other consideration included by the learned Judge in the case of Julius Kamau Kitheka (*supra*) is whether *prima facie* the intended Appeal/Appeal has chances of success or is a mere frivolity.

8. Neither the applicant nor the respondent filed any written submissions, but that does not bar me from considering the application set before me. The decision was delivered on 6th October 2023, and by 16th October 2023, the applicant had filed and served the Notice of Appeal. I take into consideration that the applicant requested for the certified copy of the proceedings immediately after the ruling; these records were given to the applicant on 6th December 2023 and a certificate of delay subsequently issued on 11th December 2023, a copy of the order was issued on 20th December; and by 21st October the application had been made.

9. Rule 84. (1) provides that:

“Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged-

- i. a memorandum of appeal, in four copies;
- ii. the record of appeal, in four copies;
- iii. the prescribed fee; and
- iv. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.



10. I note that the Notice of Appeal and the letter bespeaking proceedings was filed timeously. It is clear that the typed proceedings caused the delay in preparation, filing and service of the record of appeal. There is indeed a certificate of delay to that effect; and I find that the delay has been adequately explained; and is not inordinate. In any event, the applicant, herein, has made the present application timeously.
11. Consequently, the applicant has met and satisfied the principles set out for this court to exercise its discretion in her favor and grant the extension to the extent that the memorandum and record of appeal shall be filled within 7 (seven) days of this ruling.

DATED AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF FEBRUARY, 2024.

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

