



REPUBLIC OF KENYA



KENYA LAW
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**Natembeya & 15 others v Ondago (Civil Appeal (Application)
E006 of 2023) [2024] KECA 914 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 914 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL (APPLICATION) E006 OF 2023
SG KAIRU, JA
JULY 26, 2024
(IN CHAMBERS)**

BETWEEN

**H.E. GEORGE NATEMBEYA, GOVERNOR 1ST APPLICANT
COUNTY GOVERNMENT OF TRANS NZOIA 2ND APPLICANT
THE COUNTY EXECUTIVE COMMITTEE MEMBER FOR
FINANCE 3RD APPLICANT
COUNTY GOVERNMENT OF TRANS NZOIA CHIEF OFFICER
FINANCE 4TH APPLICANT
EDWARD OUKO 5TH APPLICANT
JAMIN KWANUSU 6TH APPLICANT
ALEX KUGERA 7TH APPLICANT
CHRIS WASIKE MUNGOMA 8TH APPLICANT
IMELDA MIDZUKANI ARUULA 9TH APPLICANT
KIRATO WANJALA WANYONYI 10TH APPLICANT
JARED RODRICK NYAUNDU 11TH APPLICANT
PATRICK CHACHA 12TH APPLICANT
SILAS MUSAKALI 13TH APPLICANT
TABITHA MUTHUI KIMONYO 14TH APPLICANT
CHRISTIAN GATHER MAHINDA 15TH APPLICANT
JAMES RWANDA NCEBEE 16TH APPLICANT**

AND



(Being an application for extension of time to file a memorandum of appeal and record of appeal against the Judgment of the High Court of Kenya at Eldoret (Mrima,J.) dated 19th September 2023 in HC. Petition No. E003 of 2023)

RULING

1. By their application dated 22nd February 2024 made under Rule 4 of the *Court of Appeal Rules* among other provisions, the applicants seek an order for extension of time within which to file and serve their memorandum and record of appeal. They intend to challenge a judgment delivered on 19th September 2023 in which the High Court at Kitale (A. C. Mrima, J.), in Constitutional Petition No. E003 of 2023, declared that the establishment of a Taskforce on Pending Bills and Human Resource Audit by the Governor of the Trans Nzoia County is unconstitutional, null and void.
2. The application was canvassed before me on 26th April 2024. The parties were represented by learned counsel. Ms. Diana Nekoye held brief for Mr. Simiyu for the applicants. Ms. E. Kyalo held brief for Ms. M. Kimondiu for the respondent. I have considered the application, the affidavits and the submissions.
3. It is not in contention that following the delivery of the High Court judgment on 19th September 2023, the applicants promptly filed a Notice of Appeal dated 22nd September 2023 and at the same time applied for copies of the proceedings which, according to the applicants, were supplied by the High Court on 17th October 2023. Approximately four months later, the present application dated 22nd February 2024 was filed.
4. Although the court has unfettered discretion under Rule 4 of the *Court of Appeal Rules*, that discretion should be exercised judicially. Each case must be considered on its own facts. In *Fakir Mobamed v Joseph Mugambi & 2 others* [2005] eKLR Waki, J.A stated that:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance - are all relevant but not exhaustive factors: See *Mutiso v Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi v Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta v Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”
5. With those principles in mind, the applicants explain that the notice of appeal was filed and the request for proceedings made out of abundant caution as instructions were awaited from the County Government; that the delay involved in filing the memorandum and record of appeal was occasioned by the need for extensive consultations within the County Government due to the complexity of the matter, which took long, and that instructions were finally given to counsel to proceed with the appeal on 9th February 2024. It is urged that at stake are colossal public funds, in excess of a billion shillings, at risk of being paid out to contractors who may not have rendered service; that the impugned decision conflicts with another decision of the High Court on the same issue and it is important, and in public interest, for this Court to settle the matter.



6. The respondents on the other hand maintain that the delay involved is not satisfactorily explained; that the claim that time was lost on account of internal consultations is not a sound explanation for the delay; that in any event the decision of the High Court is in the nature of a structural interdict, and the respondents will be prejudiced if the orders sought are granted.
7. As the Supreme Court of Kenya stated in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, Supreme Court Application No. 16 of 2014 [2014] eKLR, extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; and that delay should be explained to the satisfaction of the court. Other considerations stated by the Supreme Court include whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and public interest.
8. Although the notice of appeal was filed in time, and the letter bespeaking proceedings sent within time, and appreciating as I do, that there was an intervening Christmas recess, it undoubtedly took rather long for the County Government to conclude its internal consultations and to instruct its counsel to proceed with the appeal. Nevertheless, I am persuaded that in the circumstances of this case where it is contended that the impugned decision conflicts with another High Court decision in Constitutional Petition No. E001 of 2023, and that colossal public funds are at risk, public interest is an important consideration. It is also not evident what prejudice the respondents will suffer because of the extension of time.
9. In the result, I exercise the Court's discretion in favour of the applicants and allow the application dated 22nd February 2024. The applicants shall file and serve the memorandum and record of appeal within 30 days from the date of delivery of this Ruling. Costs of the application shall abide by the outcome of the appeal.
10. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS DAY OF 26TH JULY, 2024.

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

I certify that this is a true copy of the original.

signed

DEPUTY REGISTRAR

