



**Njomo v Waithaka & 2 others (Election Petition Appeal (Application)
E002 of 2023) [2023] KECA 753 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KECA 753 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
ELECTION PETITION APPEAL (APPLICATION) E002 OF 2023
HA OMONDI, KI LAIBUTA & JM MATIVO, JJA
JUNE 22, 2023**

BETWEEN

HON. JUDE KANG'ETHE NJOMO APPELLANT

AND

HON. JOHN MACHUA WAITHAKA 1ST RESPONDENT

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

BEATRICE SAKI MULI 3RD RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Kiambu
(Ongeri, J.) dated 24th February, 2023 in Election Petition No. E003 of 2022)*

RULING

1. Before this Court are two applications seeking diametrically opposed orders. The first in time is an application dated 5th June, 2023, filed by Beatrice Saki Muli and the Independent Electoral & Boundaries Commission (IEBC), the 2nd and 3rd respondents in this appeal respectively beseeching this Court to strike out this appeal for non-compliance with rule 27 of the [Court of Appeal \(Election Petition\) Rules, 2017](#) (“the rules”). The contestation here is that the appellants have failed to deposit security for costs as a pre-condition for hearing the appeal. The applicants also pray for costs of the application.
2. The facts in support of the application are straight forward and essentially drawn from the court record. On 14th April, 2023, this Court (Omondi, JA.) directed the appellant to deposit in court security for costs as a pre-condition for the hearing of this appeal. On 2nd May, 2023, when the matter came up for mention, it was established that the appellant had not complied with the said orders, and the court granted the applicants the liberty to apply for orders to strike out the appeal. It also ordered that, if



no application was filed within 10 days, the appeal would be deemed invalid and stand dismissed. The applicants state that they construed the said order to be self-executing.

3. On 5th June, 2023, this matter came up for mention again and the appellant's counsel informed the court that he would only comply with the said order upon filing a supplementary record of appeal. The court directed as follows:

“The appellant has not deposited security for costs. The respondents are directed under Rule 27 (2) to file and serve the relevant application and written submissions by close of business today. The appellant is directed to file and serve the response and written submissions by close of business on 6th June 2023. The application be listed for hearing within three days hereof.”

4. The applicant's core grounds are that rule 27 is couched in mandatory terms, and a party cannot decide when and how to apply with the said rule. Further, no security has been provided 52 days after the court last mentioned the matter, despite the appellant having been accorded reasonable time to comply. It is the applicant's case that despite being accorded reasonable time to pay the security deposit, the appellant has failed to comply with the said order, and that it is in the interests of justice that the orders sought be granted.
5. Shortly after the 2nd and 3rd respondent filed their application, the appellant moved this Court by an application dated 7th June, 2023, seeking orders:
 - a. that the Honourable Court be pleased to extend the period of depositing the security for costs until the applicant has filed his supplementary record of appeal; and
 - b. that this application be heard together or alongside the applicant's intended application for leave to file a supplementary record of appeal;
6. On 8th June, 2023, both parties appeared before us ready to prosecute their respective applications even though the application dated 5th June, 2023, was the only one scheduled for hearing on the said day. Even though the appellant's application is a single judge matter, after hearing brief arguments from the parties, and upon noting that the appellant's application is substantially a response to the application seeking to strike out the appeal, we directed that the two applications be heard together. In issuing the said directions, we were guided by the fact that election petitions are mandatorily required to be determined within set timelines, and that a court handling an election petition exercises time-bound jurisdiction. Therefore, it was our considered opinion that it was prudent to hear and determine both applications together to avoid the appeal being caught by the time limit.
7. The appellant attributed his failure to tender the deposit on security to his advocates' inability to obtain a certified decree orders, judgement and proceedings from the High Court in Kiambu. He also attributed his failure to financial hardship arising from the grueling election campaigns, and to the protracted and costly election petition trial before the High Court.
8. The appellant blamed Kiambu High Court registry and the Deputy Registrar of the said court for his failure to deposit the security deposit, and insisted that efforts to obtain a complete record of appeal was unsuccessful. He argued that his rights under articles 27(1), 38(3) (c), 47(1), 48 and 50(1) of the Constitution should not be infringed because his failure is attributed to the High Court at Kiambu and, therefore, he could not comply with rule 8(1) which provides for contents of record of appeal.
9. It is the appellant's case that, whereas rule 8(5) provides that the appellant may proceed to file the record of appeal and a supplementary record of appeal within seven days, the said provision could not offer



comfort to him in view of the inordinate delay and unjustified failure by the High Court. The appellant avers that he was faced with a dilemma whether it was financially prudent to deposit the security for costs, and yet the appeal could not proceed to hearing unless leave to file the supplementary record of appeal under rule 8(5) was first obtained.

10. The appellant invoked articles 10 and 259(1) of the Constitution and argued that the words "upon filing an appeal" in rule 27(1) should be construed to mean upon filing the supplementary record of appeal under rule 8(5). In the end, pursuant to rules 5, 17 and 27, the appellant maintained that his application dated 6th June, 2023, ought to be allowed.
11. The 1st respondent supported the 2nd and 3rd respondents' application to strike out the appeal.
12. In his submissions, Mr. Lubulella, learned counsel for the applicants, maintained that under rule 27(1) and (2), the appellant was supposed to deposit security for costs immediately the appeal was filed or at least immediately the court so directed. Counsel argued that failure to comply with the court's directions is sufficient for this appeal to be dismissed. Counsel also submitted that there is no provision for extension of time under rule 27 or under any other legislation. He described the question of security for costs as substantive and jurisdictional in nature without which the court could not proceed. Counsel relied on the decision in Esposito Franco v Amason Jeffah Kingi & 2 others Nairobi Civil Appeal No.248 of 2008 (2010) eKLR in which this Court held that non-compliance of set time frames in election petitions attracts the irreversible consequence of nullifying the petition.
13. In support of Mr. Lubulella's submissions, Mr. Ogado, learned counsel for the 1st respondent, argued that section 78 of the Elections Act and rule 27 are in consonant with article 87 of the Constitution to the extent that they impose timelines for determination of election disputes. He described the said provisions as mandatory and argued that this Court has no jurisdiction to extend time for the appellant to deposit security for costs.
14. Mr. Ogado termed the appellant's argument that the obligation to pay the deposit for security does not crystalize until the supplementary record of appeal is filed as a misguided interpretation of the law, and which he dismissed as contrary to the express provisions of section 78 of the Elections Act and rule 27. Counsel submitted that in the absence of an explanation from the appellant, and owing to the appellant's apparent indolence, it is evident that the appellant is not interested in prosecuting the appeal.
15. Mr. Kibe Mungai, learned counsel for the appellant, isolated two issues, namely, this Court's jurisdiction to extend time for the appellant to deposit security for costs, and whether sufficient reasons have been given for this Court to exercise its discretion in the appellant's favour.
16. Mr. Mungai cited rules 5, 17(1) and (2), and argued that this Court has the jurisdiction to extend time to deposit security for costs. He explained that the appellant's application does not seek extension of the timelines set by the Constitution or sections 85 and 85A of the Act. He submitted that rule 17(1) properly construed permits extension of time and added that he has not found a decision by this Court on the issue at hand based on the 2010 Constitution and the rules and dismissed Esposito Franco v Amason Jeffah Kingi & 2 Others (*supra*) as a pre-2010 decision.
17. On whether the appellant had given sufficient reasons to merit exercise of this Court's discretion in his favour, Mr. Mungai maintained that the appellant's affidavit in support of his application discloses



compelling reasons meriting exercise of this Court’s discretion in his favour. Counsel relied on the High Court’s finding in *Fatuma Zainabu Mohamed v Ghati Dennitah & 10 Others* (2013) eKLR that:

“the procedure for application to court for an order to dismiss the petition provides an avenue for the petitioner to show cause why the petition should not be dismissed on the ground of default of security by seeking leave of court to lodge the security out of time. The discretion to grant such leave must, of course, be exercised judicially for good cause shown”

18. First, we will address the question as to whether this Court has jurisdiction to extend time to deposit security for costs in an election petition appeal. Rule 4(1) provides as follows:

- (1) These rules apply to the conduct of appeals from decisions of the High Court in election petitions and matters relating thereto.

19. Provision of security for costs is provided for under rule 27 which provides:

27

- (1) the appellant shall, upon filing an appeal, deposit a sum of five hundred thousand shillings as security for costs of the appeal.
- (2) If no security is given, the court may, on its own motion or on an application by the respondent, issue an order directing the dismissal of the appeal and for payment of the respondent’s costs.
- (3) The court may, at any time if it thinks fit, direct that security be given for the payment of past costs relating to the matters in question in the appeal.
- (4) The Registrar may pay costs from the sum deposited as security for costs either by consent of the parties or in conformity with the decision of the Court and having regard to the rights of the parties thereunder.

20. The effect of failure to comply with the rules is a matter for determination by the court subject to the provisions of article 159(2) (d) of the *Constitution* and bearing in mind the need to observe the timelines set by the *Constitution* or any other electoral law. In this regard, rule 5 provides as follows:

The effect of any failure to comply with these rules shall be a matter for determination at the court’s discretion subject to the provisions of article 159(2) (d) of the *Constitution* and the need to observe the timelines set by the *Constitution* or any other electoral law.

21. The exercise of this Court’s discretion under rule 5 is not an open license for this Court to do that which the law does not permit. Conversely, the exercise of this Court’s discretion is limited to actions that ought to have been taken under the rules and it remains subject to the *Constitution* and other electoral laws. The foregoing is evident from rule 17(1) & (2) which provides as follows:

17.

- (1) The Court may, for sufficient reason, extend or reduce the timelines prescribed by these Rules upon such terms and conditions it may deem just and expedient, and a reference in



these Rules to any time shall be construed as a reference to that time as extended or reduced.

- (2) Sub-rule (1) does not apply to timelines set by the *Constitution* and the *Elections Act*, 2011. (Emphasis added)

22. A reading of the *Election Act* shows that the relevant provision relating to timelines within which security for cost ought to be deposited is section 78, which stipulates as follows:

78.

- (1) A petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this Part.
- (2) A person who presents a petition to challenge an election shall deposit—
- a. one million shillings, in the case of a petition against a presidential candidate;
 - b. five hundred thousand shillings, in the case of a petition against a member of Parliament or a county governor; or
 - c. one hundred thousand shillings, in the case of a petition against a member of a county assembly.
- (3) Where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the election court for an order to dismiss the petition and for the payment of the respondent's costs.

23. Clearly, the *Act* has no express provisions governing deposit of security for costs for election petition appeals to this Court. Therefore, it is correct to state that rule 27 is the sole provision that deals with security for cost in appeals before this Court.

24. The foregoing takes us to rule 17(1), which stipulates that the court may, for sufficient reason, extend or reduce the timelines prescribed by the rules upon such terms and conditions it may deem just and expedient. We are clear in our mind that this Court has the jurisdiction to extend or reduce the timelines prescribed by the rules upon such terms and conditions it may deem just and expedient provided sufficient reasons are provided. However, we must emphasize that the rules are categorical that this Court's jurisdiction to extent time does not apply to timelines set by the *Constitution* and the *Act*. The other caveat to the exercise of this Courts discretion is that its exercise is subject to the provisions of article 159(2) (d) of the *Constitution*, and the need to observe the timelines set by the *Constitution* or any other electoral law. We therefore affirm that this Court is vested with discretion to extent time to deposit security.

25. Next, we address the question as to whether the appellant has provided sufficient reasons to merit exercise of this Courts' discretion in his favour. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient reasons, and a detailed and accurate account of the cause of the delay. The explanation must be reasonable enough to excuse the default.



26. The basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degree of lateness, the explanation therefore, and the nature of the case only to mention but some. Ordinarily, these facts are inter-related; they are not individually decisive. An unsatisfactory explanation for any period of delay will normally be fatal to an application.
27. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* (2014) eKLR laid down the following principles for consideration in applications for extension of time:
- a. 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;
 - b. a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 - d. whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. whether there will be any prejudice suffered by the respondents if the extension is granted;
 - f. whether the application has been brought without undue delay; and
 - g. whether in certain cases, like election petitions, public interest should be a consideration for extending time.
28. As earlier stated, the appellant failed to comply with this Court's directions issued on 14th April, 2023, 2nd May, 2023, and on 5th June, 2023, requiring him to deposit security for costs in court. Failure by the appellant to comply with the court's directions is, in our view, sufficient to disentitle the appellant the discretion of this Court. Through his counsel, Mr. Mungai, the appellant argued that security for costs will be deposited upon the appellant being furnished with a complete version of the proceedings, short hand notes, and judgment of the High Court. The appellant further argued that he faced a dilemma as whether it would be financially prudent to deposit security for costs for an appeal that could not proceed to hearing unless and until he obtained leave to file the supplementary record of appeal envisaged under rule 8(5).
29. In Mr. Mungai's view, security for costs under rule 27(1) is only payable after they obtain the proceedings and a supplementary record of appeal filed. However, Mr. Mungai's argument, attractive as it is, suffers from several fundamental flaws, which render it untenable, does not hold. First, the argument ignores the fact that the appellant filed this appeal using uncertified court documents. This argument is tantamount to suggesting that there is no appeal before us.
30. In addition, Mr. Mungai's argument fails in the face of rule 27(1), which provides that he appellant shall, upon filing an appeal, deposit a sum of five hundred thousand shillings as security for costs of the appeal. Parliament in its wisdom used the word shall in the above provision. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory. The general rule is that an absolute enactment must be obeyed. The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory.



31. The appellant also cites impecuniosity, which he attributed to the gruesome election campaigns and litigation because of which he claims he was unable to pay the security deposit. This argument contradicts the appellant's persistent claim that he can only pay the security deposit upon being supplied with the certified proceedings and judgment, and upon filing the supplementary record of appeal.
32. In conclusion, we find and hold that the appellant has approached this Court with unclean hands. He has blatantly disobeyed this Court's orders requiring him to deposit security. The appellant is also aware that this Court is supposed to determine his appeal within 6 months from 24th February, 2023. Rule 5 requires this Court to bear in mind the need to observe the timelines set by the Constitution or any other electoral law.
33. The appellant stated on oath that it is not financially prudent for him to deposit security for costs in an appeal that may not proceed to hearing. This assertion suggests willful refusal to pay the deposit. Clearly, it is the appellant's attitude that stands on the way of his appeal much as he blames to High Court at Kiambu.
34. From the foregoing, we are persuaded that the appellant does not deserve the exercise of this Court's discretion under rules 5 and 17. Further, no satisfactory explanation has been provided for failure to deposit the security. Accordingly, we hereby dismiss the appellant's application seeking extension of time to deposit security for costs and allow the 2nd and 3rd respondent's application dated 5th June, 2023. Consequently, we hereby strike out the appellant's appeal and record of appeal dated 25th March, 2023, with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

