



Orange Democratic Movement Party & another v Opiyo & 2 others (Election Petition Appeal (Application) E186 of 2022) [2022] KECA 893 (KLR) (12 August 2022) (Reasons)

Neutral citation: [2022] KECA 893 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
ELECTION PETITION APPEAL (APPLICATION) E186 OF 2022
MSA MAKHANDIA, F TUIYOT'T & HA OMONDI, JJA
AUGUST 12, 2022**

BETWEEN

ORANGE DEMOCRATIC MOVEMENT PARTY 1ST APPELLANT

NATIONAL ELECTIONS BOARD ODM – PARTY 2ND APPELLANT

AND

GEOFFREY OTIENO OPIYO 1ST RESPONDENT

ZAKAYO ONGONO OKUMA 2ND RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

(Being an application for extension of time to file a notice of appeal out of time from the judgment of the High Court of Kenya at Kisumu, (Kamau, J.) delivered on 27th May, 2022 in HCCA NO. E034 of 2022)

REASONS

1. On 3rd August 2022, we rendered a decision, extempore, dismissing the Notice of Motion dated 15th July 2022. We now give the reasons for that decision pursuant to rule 34 (7) of the Court of Appeal Rules, 2022.
2. The Motion sought two substantive prayers; for stay of execution of the judgment and decree of Hon. Kamau, J delivered on 27th May, 2022 and the ruling and order delivered on 13th July, 2022 both in Kisumu Civil Appeal No. 034 of 2022 Zakayo Ongondo Okuma –vs- Geoffrey Otieno Opiyo & 3 Others; and for leave to file a Notice of Appeal out of time against the judgment of 27th May, 2022.
3. At plenary hearing, learned counsel Mr. Juma for the applicants informed us that the applicants were abandoning the application for stay. Stripped of it, what remained for our hearing and consideration



was an application for enlargement of time brought under rule 4 of the Rules of this Court. Before he argued the application, we urged counsel to reflect on a jurisdictional issue. By dint of rule 55 of our Rules, an application for enlargement of time to file a Notice of Appeal out of time is a matter to be heard by a single judge sitting on behalf of the Court and there would be doubt as to whether the Court, comprising of a three judge bench as we sat, had jurisdiction to hear the matter. Notwithstanding our gentle prod, learned counsel pressed on with the application.

4. The contention by the applicants was that given the exigencies of the matter and in particular being an application arising from an election matter, it, and possibly the intended appeal needed to be heard and determined before the election date of 9th August, 2022, less than a week away, this Court, as constituted, could thus hear the matter. It was explained that the application was filed 8 days before the hearing date but there was delay in processing payment of court fees by the administrative arm of the Judiciary. Counsel contended that the applicants were therefore blameless for this matter being listed before this bench. We were asked to shun procedural technicalities in the spirit of Article 159(2) of *the Constitution*.
5. Learned counsel Mr. Ayieko for the 1st respondent and learned counsel Ms. Okech for the 3rd respondent were silent on the question of jurisdiction, while the 2nd respondent's counsel, although served, did not appear.
6. In prefatory, we will deal with jurisdictional issue because should we find ourselves lacking legal authority to deal with this matter then we must down our tools.
7. Rule 55 of the *Court of Appeal Rules 2022* reads;
 55. Hearing of applications
 - (1) Each application, other than an application specified in sub-rule (2), shall be heard by a single judge:

Provided that such application may be adjourned by the judge for determination by the Court.
 - (2) This rule shall not apply to—
 - (a) an application for leave to appeal;
 - (b) an application for a stay of execution, injunction, or stay of further proceedings;
 - (c) an application to strike out a notice of appeal or an appeal; or
 - (d) an application made as ancillary to an application under paragraph (a) or (b) or made informally in the course of a hearing.
8. An application for enlargement of time is brought pursuant to rule 4, one to be heard by a single judge. It does seem, however, that there will be occasion when a single judge matter may be heard by the Court. The proviso to sub rule 1 of rule 55 contemplates this. But as is explicit from the wording of the proviso it will only be upon an adjournment by the single judge for determination by the Court. The proviso presupposes that the single judge will certify that he/she deems the application, though a single judge matter, to be fit for determination by the Court. This may be in view of some public interest consideration or such other reason.
9. Clearly, where, like here, the applicants are of a view that there is a special circumstance that would require an application for enlargement of time to be heard by the Court, then the applicants would first



have to move a single judge for an order of adjournment of the application for determination by the Court. In this event it was incumbent upon the applicants to alert the Registrar of this Court that the matter ought to have been listed before a single Judge to enable them seek the appropriate certification or order from the single Judge. This avenue was available to the applicants and they cannot lean on the overworked provision of Article 159 (2) of *the Constitution* for an easy way out. It is simply not available.

10. We have to observe that the applicants find themselves in this difficulty because of bringing an application which is the preserve of a single judge with one of the full Court in one motion. The latter being the application for stay. An unacceptable hybrid.
11. Yet even if we had jurisdiction to hear the application for enlargement of time would still have been inclined to disallow it.
12. The power of this Court granted by Rule 4 of the Court of Appeal Rules to enlarge time is discretionary. A discretion guided by well settled considerations. The decision in *Fakir Mohamed –vs- Joseph Mugambi & 2 Others* [2005] eKLR restated those considerations to be: -

“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...”

13. The reasons proffered by the applicants for failing to file the notice of appeal timeously are that they attempted to purge the contempt of the Political Parties Disputes Tribunal's “PPDT” judgment which was upheld by the High Court, in good time and were of the honest belief that the orders of the High Court were discharged when the applicants facilitated a consensus meeting held between the 1st and 2nd respondents and all aspirants who participated in the primaries for South Kasipul Ward which bore fruit on 19th May 2022.; that on 21st May, 2022 the issue of party primaries escalated to the applicants' central committee which considered the PPDT's judgment and the minutes of the consensus meeting and decided on the 2nd respondent as its preferred candidate; that in their presumption of compliance, they did not instruct their advocates to appeal the judgment of 27th May 2022; and that it was only when their officials were found in contempt of the orders emanating from the judgment of 27th May 2022 that it became necessary to appeal both against the judgment and the ruling of 13th July 2022.
14. What amounts to inordinate delay will depend on the circumstances of each case. In this regard the Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 others* [2014] eKLR underscored the need of parties to electoral disputes to comply with timelines thus: -

“Time is a crucial component in dispensation of justice, hence the maxim: Justice delayed is justice denied. It is a litigants' legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined. Time is of more essence in election matters where the people's sovereign power to elect their legal representatives is involved. It is with this recognition that *the Constitution* provides for the time frames within which election matters have to be heard and determined”

15. The explanation given by the applicants is as convoluted as it is confusing. As we understand it, the applicants contend that because of various events prior to the date of the judgment of 27th May 2022,



they were of the belief that they had complied with the tribunal's judgment and ruling and were therefore of the honest belief that they had equally discharged the judgment of the High Court as it had affirmed the decisions of the Tribunal. This is a contention that they were at this point, satisfied with the decision of the High Court. To the credit of the learned Judge she elaborated on the implication of the decision as follows;

“ 84. The effect of this judgment is that the decisions of the Political Parties Dispute decision that was delivered on and 3rd May 2022 be and is hereby upheld. The 1st and 2nd Interested Parties be and hereby directed to conduct fresh nominations by way of universal suffrage within seventy two (72) hours from the date of this decision and only adopt any of the nomination methods set out in Rule 8 of the Orange Democratic Movement Party Primaries Election Rules as approved by the National Executive Committee held on 12th February 2021 with the consent of all candidates who shall be participating in the fresh nominations for South Kasipul Ward, in Kasipul Constituency within Homabay County.”

16. A dissatisfaction appears to have arisen when the High Court delivered its ruling on 13th July, 2022 in which it concluded that the Chairperson of the 2nd applicant was in contempt of the order of the Court of 27th May, 2022. In making that finding the High Court observed;

“ 68. There was no indication by the 1st and 2nd Interested Parties that they even attempted to conduct the party primaries nominations by way of universal suffrage in the first instance as had been ordered by the court. The Extract of the Minutes of the Central Committee on Consideration of the Report on Party Primaries held on Saturday 21st May 2022 at Emory Hotel, Nairobi City County were well before the court delivered its decision on 27th May 2022, a fact that was clearly stated by the 1st Respondent herein.”

17. In our understanding what aggrieves the applicants is the Ruling of 13th July, 2022 made in the contempt proceedings and not the Judgment of 27th May, 2022. The attempt to construct a nexus between the two decisions so as to explain a delay of over sixty (60) days is therefore unacceptable.

18. The effect of the delay is apparent in the affidavit in support of urgency sworn by learned counsel Jackson Awele Onyango for the applicants. He deposes:

“(1) Time is of the essence in the determination of the Application herein. The dispute before the Honourable court involves the nomination for the position of member of the county assembly of Homabay for South Kasipul Ward by the Orange Democratic Party in the upcoming general elections scheduled to take place on 9th August 2022.

(2) The deadline for gazette of candidates for all positions in the upcoming general elections by the Independent Electoral and Boundaries Commission lapsed on the 9th of June 2022, at the time, the parties herein litigated over the conduct of the primaries held in South Kasipul Ward before the Political Parties Disputes Tribunal and on Appeal at the High Court Kisumu.

(3) On 13th July 2022, the High Court in Kisumu delivered a subsequent Ruling in High Court Civil Appeal E034 of 2022 that the Applicants intend to



Appeal. The Ruling of 13th May 2022 and the judgment of 27th May 2022 are inextricably related with the former tracing its origins from the latter.”

19. It is a plea that both the application and intended appeal be heard and determined well before the 9th August, 2022. This is a herculean, almost impossible task, given that the application was filed on 2nd August, 2022, just seven (7) days before the election date! It cannot be any clearer that the delay is acutely inordinate in the circumstances of this case.
20. For reasons given, we strike out the application dated 15th July 2022 with costs on account of want of jurisdiction.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF AUGUST 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

