



REPUBLIC OF KENYA



**Khalifa v Wafula Chebukati & 2 others (Civil Application
E124 of 2022) [2022] KECA 1024 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1024 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E124 OF 2022
W KARANJA, JA
SEPTEMBER 23, 2022**

BETWEEN

KHELEF KHALIFA APPLICANT

AND

RAILA ODINGA 1ST RESPONDENT

WAFULA CHEBUKATI 2ND RESPONDENT

KALONZO MUSYOKA 3RD RESPONDENT

*(Being an application for extension of time within which to file and serve
notice of appeal against the decree and ruling of the High Court at Nairobi
(H. Ongudi, J) dated 17th March, 2022 in Misc. Application No. E033 of 2022)*

RULING

1. The applicant moves this Court by way of a Notice of Motion dated April 14, 2022 under Rules 4 and 75 of the [Court of Appeal Rules](#) (the Rules). He seeks an order extending the time within which to file and serve the Notice of Appeal against the ruling and order of Hon. H. Ongudi, J issued in Misc. application No. E033 of 2021 on the March 17, 2022. It is supported by grounds on its face which include grounds that the learned Judge issued an order dismissing the applicant's application seeking to enforce orders of the Supreme Court issued in Petition No. 1 of 2017; he is wholly dissatisfied with the decision and that his counsel who was handling the matter, due to personal reasons was not able to file a Notice of Appeal within the stipulated time; that the parties in this application shall not suffer any prejudice; the intended appeal will enrich the jurisprudence on public interest litigation and accountability of State Officers in complying with orders of the court; that this Court is vested with the discretion and power to grant the order and that it is in the interest of justice that the said order be granted.



2. It is supported by the affidavit sworn by Khelef Khalifa on April 24, 2022 in which he largely reiterates the grounds on the body of the motion.
3. The applicant had filed before the High Court an application dated September 27, 2021 seeking to institute contempt of court proceedings against the 1st respondent for continued disobedience of the orders issued by the Supreme Court of Kenya in Petition No. 1 of 2017 on August 28, 2017. It was his case that the Supreme Court had directed that an ICT Officer designated by the Court and two independent IT experts appointed by the Court to supervise access to technology including servers held by IEBC for the 2017 Presidential Elections.
4. It was further averred that the respondent had been served with the said orders but had wilfully refused to comply and as a result the parties and Kenyans had been denied access to the technology and in particular the servers used in the Presidential Elections whose results were the subject of Petition No. 1 of 2017 before the Supreme Court.
5. The applicant asked the court to imprison the 1st respondent for six (6) months for violating the said orders and Articles 73 and 75 of *the Constitution*.
6. The applicant's motion was opposed by the 1st respondent through his replying affidavit sworn on October 18, 2021. He averred that the Supreme Court order was against IEBC and not him as a person and that the Court did not impose any criminal intent or culpability on him or any other commissioner and that the High court lacked jurisdiction to bar or suspend him from office. He filed a preliminary objection challenging the jurisdiction of the High Court and maintained that the application offended the provisions of Article 251 of *the Constitution*, section 28(4) of the *Supreme Court Act*, 2011, sections 7, 28, 29, 30, 31 and 33 of the *Civil Procedure Act* and rules 29, 30 and 57 of the *Supreme Court Rules* 2020.
7. The applicant filed his response to the preliminary objection vide a replying affidavit sworn on the November 3, 2021.
8. The application and preliminary objection were canvassed by way of written submissions and upon considering the pleadings and the submissions, the High Court in its ruling now impugned held that it lacked the jurisdiction to determine the application and hence struck it out and upheld the preliminary objection with costs.
9. If the applicant desired to appeal against that ruling, then the Notice of appeal ought to have been filed within 14 days from the March 17, 2022, but this was not done, hence the motion now before the Court. The only reason given for the delay was "personal reasons" on the part of the applicant's former counsel.
10. In response to the instant motion the 1st respondent has filed his replying affidavit sworn on the May 15, 2022. He avers that the applicant has failed to give any plausible and satisfactory explanation for the delay which should enable the Court to exercise its discretion to either grant or deny the order being sought. Further, that the applicant has failed to demonstrate whether the intended appeal is arguable and that the applicant's counsel was present when the ruling was delivered, therefore, his explanation on the advocate being unable to file a Notice of appeal in time and serve it is misleading.
11. Finally, he has deponed that the application is frivolous, vexatious and an abuse of the court process thus it lacks merit and it should be dismissed with costs.



12. The 3rd respondent also opposes the Notice of motion vide his grounds of opposition dated June 30, 2022 for being bad in law, incompetent and that the applicant has failed to provide satisfactory reasons as to why the Court should extend the time within which to file and serve the Notice of appeal.
13. The applicant in his submissions dated May 10, 2022 submits that there is a delay of 8 days from when ruling was delivered. He introduces an explanation that is not mentioned either in the grounds on the face of the application or in the depositions in the affidavit in support of the motion. He says that the reason for the delay was that his counsel was not present when the ruling was delivered and once he learnt of it, he quickly moved to file this application. Further, that the respondents shall not suffer any prejudice if the application is allowed, keeping in mind that Article 50 of *the Constitution* grants the right to a fair hearing. To buttress this argument the Court has been urged to rely on *Visva Stone Suppliers Company Limited v. RSR Stone [2006] Limited* [2020] eKLR, in considering the circumstances when to grant such an extension of time.
14. In response, the 1st respondent in his submissions urges that the applicant is misleading the Court by stating that the delay is of 8 days, which is not the true position ruling having been delivered on March 17, 2022. Further that the applicant had to wait for 4 years in order to institute contempt proceedings; the delay was inordinate implying that the application at the High Court was an afterthought.
15. Additionally, it is submitted that the applicant is misleading the Court by stating that his counsel was absent when the ruling was delivered yet the ruling date was taken in the presence of his counsel on February 14, 2022.
16. The Court is urged further to find that the applicant has not demonstrated he has an arguable appeal despite his failure to annex a draft memorandum of appeal. Reliance was placed on the case of *Karny Zabarya & another v. Shalom Levi*, Civil Application No. 80 of 2018 where the court held that it considers the need to ensure timely resolution of disputes and whether prima facie, the intended appeal has chances of success or is a mere frivolity. He further submits that extension of time is an equitable remedy and as such, equity favours the vigilant and not the indolent.
17. The 3rd respondent filed his submissions dated June 30, 2022. He submits that upon delivery of the ruling, the applicant took 29 days to file this instant application, yet he does not give a satisfactory reason for the delay.

Further that under Rule 4 of the Rules, the Court should exercise its discretion judicially but in the circumstances the applicant does not deserve to be granted the said order and lastly that the application be dismissed with costs.
18. I have considered the application along with the rival affidavits and submissions of the parties and the applicable law. Rule 75(1) and (2) of the Rules requires any person who desires to appeal to this Court to give notice in writing within 14 days of the date of the decision against which it is desired to appeal, whereas rule 77(1) requires that the Notice to be served on the respondent within 7 days of filing the notice.
19. It is not disputed that the applicant failed to file the Notice of appeal within the prescribed time. The impugned Ruling was delivered on March 17, 2022 and the application for enlargement of time was not filed until April 14, 2022, which in my estimation is about 27 days after delivery of the impugned ruling and about 2 weeks after expiry of the time allowed for the filing of a Notice of appeal as of right.
20. The principles guiding the Court in extending time under Rule 4 of the Rules are settled.
21. In *Nyaigwa Farmers' Co-operative Society Limited v. Ibrahim Nyambare & 3 others* [2016] eKLR, the Court restated the principles as; the length of the delay, the reasons for the delay, the chances of the



appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is allowed.

22. The question as to whether a delay is inordinate or not depends on the circumstances of each case. In some cases the delay of two weeks, as is the case here might be found to be inordinate while in other cases, a delay of several months may be found not inordinate. The length of the delay, in my view must be considered vis a vis the reasons given for the delay. In his affidavit in support of the motion, the applicant cites “personal reasons” on the part of his advocate as the only reason for not filing the intended appeal on time.
23. Extension of time is not granted automatically and a party who desires the court to exercise its discretion in his favour in this regard must demonstrate to the court that such extension is deserved. See *Julius Kamau Katbeka v Weruguru Ayaga & 2 others* [2013] eKLR where it was stated that extension of time is not a right of a party but it is a discretionary remedy. There is in my view no reason whatsoever advanced for the delay herein. That being the case, I do not even have the ground to stand on as a starting point in considering whether the reasons given are plausible or not.
24. The delay of 14 days (according to my count) may not appear too long on its face, but the law requires that an explanation be given for the delay. I note that the applicant has belatedly, in the last paragraph of his submissions suggested that his lawyer was not aware of the ruling, but that does not replace the need for a deposition explaining the delay. In any event, it is not disputed that the date of delivery of the ruling was given in court in presence of all counsel.
25. I note further that there is no indication as to the nature of the challenge to be presented before this Court against the learned Judge’s findings on jurisdiction of the High Court to entertain an application for contempt of orders issued by the Supreme Court. Whereas it is not necessary for the applicant to attach a draft memorandum of appeal for purposes of an application under rule 4 of the Court rules, it is incumbent upon the applicant to demonstrate that he is not engaging in a frivolous excursion which may only be for purposes of self-aggrandisement. See *Paul Wanjobi Mathenge v. Duncan Gichane Mathenge* [2013] eKLR.
26. I am also not oblivious of the fact that the judgment the applicant was trying to enforce before the High Court had been issued 4 years earlier and there was no reason why the applicant could not have moved the Court earlier. In addition, the applicant has not demonstrated the prejudice that he may suffer if leave is not granted. Conversely, the respondents herein stand prejudiced if the Court allows this matter to continue hanging over their heads indefinitely.
27. For the foregoing reasons, I am not persuaded that I should exercise my discretion in favour of the applicant herein. I find the application devoid of merit and dismiss it with costs to the 1st and 3rd respondents.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

W. KARANJA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

