



**Gidion v Director of Public Prosecutions; Chief Magistrate's Court - Milimani
Anti-Corruption Court & 18 others (Interested Parties) (Criminal Application
E005 of 2020) [2022] KECA 1323 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1323 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPLICATION E005 OF 2020
MSA MAKHANDIA, JA
DECEMBER 2, 2022**

BETWEEN

KIOKO MIKE SONKO MBUVI GIDION APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

AND

**CHIEF MAGISTRATE'S COURT - MILIMANI ANTI-CORRUPTION COURT &
18 OTHERS INTERESTED PARTY**

*(Being an Application for leave to file the Notice of Appeal out of time in an
intended Appeal against the Ruling and Orders of (M. Ngugi, J.) delivered
on 17th July, 2020) in Nairobi ACEC Revision Application No. 8 of 2020)*

RULING

1. By a notice of motion dated 11th September, 2020 brought pursuant to rules 4 and 5(2) (a) of the [Court of Appeal Rules](#) and a supporting affidavit of Hon. Kioko Mike Sonko Mbuvi Gidion, hereinafter “the applicant”. The applicant seeks that this Court grants him leave to file the notice of appeal out of time in respect of the ruling and order of Mumbi Ngugi, J. (as then she was) delivered on 17th July, 2020. This was in respect of Nairobi High Court Anti-Corruption and Economic Crimes Division, Revision Application No. 8 of 2020, Director of Public Prosecutions vs. The Chief Magistrates' Court Milimani Anti-Corruption Court & Others.
2. The genesis of this application is that the applicant was charged with corruption-related cases in Nairobi ACC No. 32 of 2019, Republic vs. Kioko Mike Sonko & 16 Others and ACC No. 31 of 2019, Republic vs. Kioko Mike Sonko & 3 Others. When the matter came up on 27th January 2020, the court directed that the prosecution disclose evidence in their possession to the defence within two weeks.



The matter was mentioned on the 18th February, 2020 to confirm compliance with the earlier directions but there was non-compliance on the part of the respondent. They were then given up to 26th February 2020 to comply. However, on the said date, there was still no compliance and more time was sought which prompted the trial magistrate to question the recalcitrance of the respondent to submit to the directions of the Court. The learned magistrate then gave directions that the relevant agencies ensure that at the time of filing the charges in the Anti- Corruption Court, they must simultaneously file a copy of the inventory and its only upon satisfaction of these requirements that a plea will be accepted for registration and only then will a matter be fixed for plea taking.

3. This ruling did not go well with the respondents who immediately filed an application in the High Court dated 19th May, 2020 for revision of the aforesaid directions. The High Court in a ruling delivered on 17th July, 2020 set aside the ruling and orders of the Chief Magistrate. It is that ruling that the applicant is not content with and seeks to appeal against.
4. The reasons advanced for failure to file the notice of appeal on time are that he was busy with duties as the Governor of the County of Nairobi and hence could not find time to peruse the ruling within time and further that with the advent of the Covid-19 scourge, his movements were restricted and could not meet with his legal team so that he could give the instructions to appeal.
5. That he has an arguable appeal as can be gleaned from the annexed draft memorandum of appeal, the gravamen being that the ruling goes against the right to a fair hearing envisaged under Article 50 of *the Constitution*.
6. The application is opposed by the 18th interested party, the Ethics and Anti- Corruption Commission through the affidavit of one Simon Cherpka, an investigator with the commission. He depones that rule 59 (1) of Court of Appeal Rules, expressly provides that a notice of appeal shall be filed within 14 days of the date of the decision yet the applicant served his notice of appeal upon the Commission on 7th December 2020, over four months after lapse of the notice period. That even though this Court has unfettered discretion to extend time for filing an appeal, in exercising such discretion, however, this Court is guided by principles established through judicial precedents among them those expounded in the case of *Nicholas Kiptoo Arap Korir Salat vs. The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR. Further, that between 17th July, 2020 when the ruling was delivered and the time when this application was lodged, the applicant had appeared in court six (6) times either in person, virtually and/or represented by counsel on 20th and 25th August 2020, 25th, 29th September 2020, 27th and 23rd October 2020 for hearing of applications and/or mentions for pre-trials in ACC No. 32 of 2019.
7. The other parties did not participate in this application as none filed any document in support of or in opposition to the application. The applicant filed written submissions dated 20th November 2020 whilst the 18th interested party relied on the authorities highlighted in the submissions of the applicant. The applicant merely reiterates the reasons advanced in support of the application. There is therefore no need to rehash them.
8. Extension of time is provided for under Rule 4 of the Court of appeal Rules which provides, inter alia:

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.



9. The Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others, held that:

“it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favor of the applicant.”

10. In its decision, the Supreme Court observed:

“...we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. Equitable remedy that is only available to a deserving party, at the discretion of the Court;
2. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. Where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents, if extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

11. The court therefore has the ultimate discretion in allowing or disallowing an application for extension of time as long as it deems just.

12. In the present case, the ruling was delivered on 17th July, 2020 and the appellant did not take any steps after delivery of the ruling within the 14 days required to file a notice of appeal. The applicant had to wait until 11th September, 2020 to bring the current application. This is a period of less than two months. I agree with the applicant that the period of delay was within the time of the Covid-19 pandemic. The reason for the delay has been alluded to the fact that there was the pandemic of Covid-19 which curtailed the applicant’s movement and interaction with his counsel on record. The effects of Covid-19 pandemic is a fact well within the knowledge of everyone and there is no need to adumbrate more. I agree with the reason for delay as genuine since the pandemic even changed the modus operandi of the courts as well.

13. On the intended appeal being arguable, I have had the occasion to look at the annexed draft memorandum of appeal and the grounds raised therein and I think they are those that require the respondent to answer to and the court to make a determination on. Hence the intended appeal is arguable.



14. Having said as much, I am of the considered view that the applicant has satisfied me that he is deserving of the orders sought in the application. Consequently, the application dated 11th September, 2020 is allowed with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

