IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO(P), NAMBUYE & ASIKE-MAKHANDIA JJ.A.)

CIVIL APPLICATION NO. E248 OF 2020

BETWEEN

THE BOARD OF TRUSTEES OF

LOCAL AUTHORITIES PROVIDENT FUND.....1ST APPLICANT

DAVID KOROSS, THE CHIEF EXECUTIVE OFFICER

LOCAL AUTHORITIES PROVIDENT FUND..... 2ND APPLICANT

AND

KENYA COUNTY GOVERNMENT WORKERS UNION ..….... 1ST RESPONDENT

MATILDA JEBET KIMETTO ……...……..…. 2ND RESPONDENT

BENSON OLIANG'A ORIARO ……..……..…. 3RD RESPONDENT

BERNARD ATSULU INYANGALA ……..…….. 4TH RESPONDENT

BONIFACE WAWERU GITUKE ……..……..…. 5TH RESPONDENT

EMILY W. MWANGI …….....…… 6TH RESPONDENT

FRED BULUKU ……....…..……..… 7TH RESPONDENT

CHARLES MAKINI ……..……..…….. 8TH RESPONDENT

THE ATTORNEY GENERAL ……..……... 9TH RESPONDENT

THE CABINET SECRETARY,

NATIONAL TREASURY AND PLANNING ……....….. 10TH RESPONDENT

MINISTRY OF DEVOLUTION ……...……....… 11TH RESPONDENT

THE CABINET SECRETARY, MINISTRY OF STATE FOR

PUBLIC SERVICE, YOUTH AND GENDER ……....…..…... 12TH RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF LABOUR AND SOCIAL PROTECTION …..... 13TH RESPONDENT

THE RETIREMENT BENEFIT AUTHORITY ……..…... 14TH RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA ……..….. 15TH RESPONDENT

THE COUNTY GOVERNMENT OF KWALE ……..... 16TH RESPONDENT

THE COUNTY GOVERNMENT OF KILIFI ……..... 17TH RESPONDENT

THE COUNTY GOVERNMENT OF TANA RIVER ……..…..... 18TH RESPONDENT

THE COUNTY GOVERNMENT OF LAMU ……..... 19TH RESPONDENT

THE COUNTY GOVERNMENT OF TAITA/TAVETA ……..... 20TH RESPONDENT

THE COUNTY GOVERNMENT OF GARISSA ……...…..... 21ST RESPONDENT

THE COUNTY GOVERNMENT OF WAJIR ……..…..…..… 22ND RESPONDENT

THE COUNTY GOVERNMENT OF MANDERA ……..... 23RD RESPONDENT

THE COUNTY GOVERNMENT OF MARSABIT ……..... 24TH RESPONDENT

THE COUNTY GOVERNMENT OF ISIOLO ……...….. 25TH RESPONDENT

THE COUNTY GOVERNMENT OF MERU ……..... 26TH RESPONDENT

THE COUNTY GOVERNMENT OF THARAKA-NITHI …..... 27TH RESPONDENT

THE COUNTY GOVERNMENT OF EMBU……...…..28TH RESPONDENT

THE COUNTY GOVERNMENT OF KITUI……...…....29TH RESPONDENT

THE COUNTY GOVERNMENT OF MACHAKOS……..…….....30TH RESPONDENT

THE COUNTY GOVERNMENT OF MAKUENI……...…..31ST RESPONDENT

THE COUNTY GOVERNMENT OF NYANDARUA……..…..….32ND RESPONDENT

THE COUNTY GOVERNMENT OF NYERI……...….....…..33RD RESPONDENT

THE COUNTY GOVERNMENT OF KIRINYAGA……..……34TH RESPONDENT

THE COUNTY GOVERNMENT OF MURANG'A……...…..35TH RESPONDENT

THE COUNTY GOVERNMENT OF KIAMBU……....…..36TH RESPONDENT

THE COUNTY GOVERNMENT OF TURKANA……...….37TH RESPONDENT

THE COUNTY GOVERNMENT OF WEST POKOT……..…..…38TH RESPONDENT

THE COUNTY GOVERNMENT OF SAMBURU……...…..39TH RESPONDENT

THE COUNTY GOVERNMENT OF TRANS NZOIA…….....40TH RESPONDENT

THE COUNTY GOVERNMENT OF UASIN GISHU…….....….....41ST RESPONDENT

THE COUNTY GOVERNMENT OF ELGEYO MARAKWET....42ND RESPONDENT

THE COUNTY GOVERNMENT OF NANDI……...…..…...43RD RESPONDENT

THE COUNTY GOVERNMENT OF BARINGO……...44TH RESPONDENT

THE COUNTY GOVERNMENT OF LAIKIPIA……..…..45TH RESPONDENT

THE COUNTY GOVERNMENT OF NAKURU……...…..46TH RESPONDENT

THE COUNTY GOVERNMENT OF NAROK……..……..47TH RESPONDENT

THE COUNTY GOVERNMENT OF KAJIADO……..……..48TH RESPONDENT

THE COUNTY GOVERNMENT OF KERICHO……..…....49TH RESPONDENT

THE COUNTY GOVERNMENT OF BOMET……..…….....50TH RESPONDENT

THE COUNTY GOVERNMENT OF KAKAMEGA……..…..51ST RESPONDENT

THE COUNTY GOVERNMENT OF VIHIGA……..…….....52ND RESPONDENT

THE COUNTY GOVERNMENT OF BUNGOMA……..…....53RD RESPONDENT

THE COUNTY GOVERNMENT OF BUSIA……..……....54TH RESPONDENT

THE COUNTY GOVERNMENT OF SIAYA……...……..55TH RESPONDENT

THE COUNTY GOVERNMENT OF KISUMU……..……..56TH RESPONDENT

THE COUNTY GOVERNMENT OF HOMA BAY…….....…..57TH RESPONDENT

THE COUNTY GOVERNMENT OF MIGORI……...……..58TH RESPONDENT

THE COUNTY GOVERNMENT OF KISII……..……..59TH RESPONDENT

THE COUNTY GOVERNMENT OF NYAMIRA……...……..60TH RESPONDENT

THE COUNTY GOVERNMENT OF NAIROBI ……..……...61ST RESPONDENT

COUNTY PENSION FUND FINANCIAL

SERVICES LIMITED……..…..62ND RESPONDENT

LOCAL AUTHORITIES PENSION TRUST……...…….63RD RESPONDENT

LAPTRUST RETIREMENT SERVICES LIMITED……...……64TH RESPONDENT

THE COUNCIL OF GOVERNORS……..…...…65TH RESPONDENT

WATER SERVICES PROVIDERS ASSOCIATION….....66TH RESPONDENT

THE COUNTY PENSION FUND

BOARD OF TRUSTEES……...…..67TH RESPONDENT

OKIYA OMTATAH OKOITI…….……68TH RESPONDENT

(Being an application to strike out a Notice of Appeal dated 22nd July 2020

against the ruling and orders of the Employment and Labour Relations Court

(M. Onyango, J.) dated 3rd July 2020

in

Nairobi Petition No. 222 of 2019)

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RULING OF THE COURT

On 26th January 2021, the Notice of Motion dated 19th August 2020 came up before us for hearing and determination. The motion is brought under **Rule 84** as read together with **Rules 72 and 75** of the **Court of Appeal Rules 2010**. The motion substantively seeks orders

that the 1st and 8th respondent's Notice of Appeal dated 22nd July 2020 and filed in the Employment and Labour Relations Court and served upon the Applicant's counsel on 13th August, 2020 be struck off; with an attendant order that costs of this application be provided for.

It was supported by grounds on its body, a supporting affidavit of **David Korosi** together with annextures thereto. It has been opposed by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents replying affidavit sworn by **Roba S. Duba** together with annextures thereto. It was canvassed virtually through the respective parties rival pleadings, written submissions, legal authorities and oral highlighting by counsel in respect of their opposing positions. learned senior counsel **Mr. Ngatia** appeared for applicants, learned counsel **Gladys Wamaitha** appeared for the 14th respondent, **Brian Otieno** for 1st – 8th respondents, **Dr. Muthiomi Thiankolu** for the 63rd and 67th respondents and J**. M. Njenga** for the 6th interested party. The 68th respondent **Okiya Omutatah** appeared in person.

The background to the application albeit in a summary form is that on 8th November 2019, the 68th Respondent herein filed Petition No. 213 of 2019, **Okiya Omtatah Okoiti vs. The County Governments Retirement Scheme & 152 Others**. on 15th November 2019, the 1st - 8th Respondents herein filed **Petition No. 222 of 2019, Kenya County Government Workers Union & 7 Others vs. The Board of Trustees of Local Authorities Provident Fund & 54 Others**. on 5th December 2019, the 63rd and 67th Respondents herein filed **Petition No. 230 of 2019, Local Authorities Pensions Trust Board of Trustees & Another vs. the Attorney General & 3 Others**. On 9th December, 2019, parties in Petition No. 213 and Petition No. 222 of 2019 recorded a consent consolidating the two petitions. Petition No. 213 was made the lead file. On 27th February, 2020 following consolidation of Petition No. 213 and 222 of 2019 the 1st Applicant filed an application dated 26th February, 2020 (the 1st Application) seeking orders that Petition No. 230 of 2019 be consolidated with Petitions No. 213 of 2019 and Petition No. 222 of 2019 as consolidated and that upon consolidation, the three petitions be listed for directions on their expeditious disposal. On 27th May 2020 the 63rd and 67th Respondents herein who are the Petitioners in Petition No.230 of 2019, filed an application dated 26th May 2020 (the 2nd application) seeking that the three (3) petitions be certified as raising substantial questions of law. Upon Certification, the 63rd and 67th Respondents requested that the consolidated Petitions be placed before the Hon. the Chief Justice of the Republic of Kenya for purposes of empaneling an uneven number of judges, being not less than three (3) to hear and determine the consolidated petitions. The 1st - 8th Respondents did not file any application. By a composite ruling delivered on 3rd July 2020 the Employment and Labour Relations Court granted orders sought in the 1st Application thereby consolidating Petition No. 230 of 2019 with Petitions No. 213 of 2019 and Petition No. 222 of 2019 and declined the 2nd application with costs. No appeal has been preferred by the parties who made the applications.

It is against the above background that applicants have invited this Court to fault the 1st – 8th respondents initiated appellate process. It is the applicants' contention that the ruling having been delivered on 3rd July, 2020, the notice of appeal ought to have been filed on or before 10th July, 2020 and served upon the opposite parties on or before 17th July, 2020. It was also applicants' complaint that the 1st – 8th respondents record of appeal lodged on 22nd July 2020 and served on 13th August, 2020 was grossly out of time. Both processes therefore stand vitiated and should be struck out as according to applicants both the notice of appeal and the record of appeal are incompetent in law and do not therefore warrant a merit disposal. In addition to the above assertions the applicants also contend that both processes of appeal have been filed with ulterior motives namely, to forestall the intended expeditious disposal of the consolidated petitions and to prevent the implementation of a statute duly enacted by the National Assembly to the detriment of applicants. Third, the erroneously initiated appellate process is an abuse of the due process of the Court. The Court should therefore invoke its inherent powers and strike them out.

To buttress the above submissions, the applicants rely on the following authorities; **Muchanga Investments Ltd vs. Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR** for the holding *inter alia* that it is an abuse of the Court process to use the legal process to accomplish an ulterior purpose other than to protect the interests of justice. Second, that proceedings which lacked bona fides and which were intended to oppress, cause delay and/or prejudice to the other party amount to an abuse of the court process; **Kenya Power & Lighting Company Limited vs. Benzene Holdings Limited t/a Wyco Paints [2016] eKLR** for holding that the Court's inherent power is a residual intrinsic authority which it may resort to in order to put right that which would otherwise be an injustice; **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** in which the Supreme Court held that a notice of appeal is a jurisdictional prerequisite and an appellate court lacks jurisdiction to entertain an appeal founded on an invalid notice of appeal; **Lesirma Simeon Saimanga vs. Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR** wherein the Court held that an invalid notice of appeal was incapable of conferring the requisite jurisdiction upon the Court and thus incurable by the provision of **Article 159** of the Constitution. Second, that parties seeking to avail themselves of the Court's jurisdiction were duty bound to pay homage to **Rules** by filing a valid notice of appeal. Lastly, the case of **Daniel Nkirimpa Monirei vs. Sayialel Ole Koilel & 4 Others [2016] eKLR** and **Equatorial Land Holdings Limited & Another vs. Cheseret Arap Korir** [**2020**] **eKLR** in which the Court struck out an invalid notices of appeal for the reason that they had been filed out of time and without leave.

In rebuttal, the 1st – 8th respondents both in their averments in the replying affidavit and written submissions contend that they are parties to the consolidated petitions. They concede they did not file any application therein after the consolidation order was issued. They are, however, aware that two applications were filed and being interested parties by virtue of being parties to the consolidated petitions they filed submissions in support of the application dated 26th May, 2020 in Petition No. 230 of 2019. They concede the resulting ruling from the consolidated applications was delivered on 3rd July, 2020 while their notice of appeal was filed on 22nd July, 2020 and served on the applicants on 13th August, 2020.

Relying on the authority of the case of **Joseph Kiangoi vs. Wachira Waruru & 2 Others [2010] eKLR** and **Safaricom Limited vs. Jack K. Khanjira & Another [2018] eKLR**, they argue that circumstances peculiar to the application under consideration do not warrant the exercise of the Court's draconian power of striking out the 1st – 8th respondents notice and record of appeal dated 22nd July, 2020.

Relying on **Fakir Mohamed vs. Joseph Mugambi & 2 Others** [**2005**] **eKLR** and **Athuman Nusura Juma vs. Afwa Mohamed Ramadhan [2016 eKLR,** they further submitted that the ruling triggering their appeal was delivered on a Friday, 3rd July, 2020 and taking into consideration the period to be discounted in the computation of time pursuant to the relevant **Rules** of the Court, their notice of appeal filed on 22nd July, 2020 was filed within time and is therefore validly on record. In the alternative, that even if it were to be accepted of which they do not that their notice of appeal was indeed filed outside the time stipulated in **Rule 75** of the Court's **Rules**, that in itself does not operate to disentitle them to the accrued appellate right as the delay involved is only five (5) days, which in their opinion does not amount to an inordinate delay or inexcusable or an abuse of the Court process. They also rely on their uncontroverted explanation that the delay in complying with the said timelines was occasioned by challenges encountered in filing court documents online after courts scaled

down open court operations due to the Covid-19 pandemic, circumstances that were unforeseen and are therefore excusable. In support of this argument they have annexed to their replying affidavit numerous correspondences exchanged between their Advocate and the Deputy Registrar of the Court, over the issue of filing, all of which according to them go to demonstrate sufficiently that their Advocate was more than vigilant in pursuing their appellate right.

On the record of appeal, the 1st – 8th respondents submit that sustaining and allowing the record of appeal for consideration on merit would in their opinion promote justice and public confidence in the court system especially when, according to them the appeal also deals with novel issues of general public importance touching on the respondents' personal right to dictate the terms of their pension in a manner that is not detrimental to them.

Relying on the authority of **Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR**, the 1st – 8th respondents argued that they have an arguable appeal and hence they should not be denied their undoubted right of appeal on account of procedural technicalities, curable under **Rule 4** of the Court's **Rules** and **sections 3A** and **3B** of the **Appellate Jurisdiction Act**.

To buttress the above submissions, they relied on **Article 159(2)(d)** of the Constitution of Kenya as numerously construed and applied in the following authorities; namely, **Jaldesa Tuke Dabelo vs. IEBC & Another [2015] eKLR; Raila Odinga and 5 Others vs. IEBC & 3 Others [2013] eKLR; Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others [2014]eKLR; Patricia Cherotich Sawe vs. IEBC & 4 Others [2015]eKLR; Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR;** and **Board of Governors, Moi High School, Kabarak** & **Another vs. Malcolm Bell [2013] eKLR; Kamlesh Mansukhalal Damji Pattni vs. Director of Public Prosecutions & 3 Others [2015] eKLR** and submitted that according to them rules of procedure are intended to serve as the hand maidens of justice, and not to defeat it; that in the instant application lapses in form and procedure which do not go to the jurisdiction of the Court or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party should not be sanctioned to defeat the 1st – 8th respondents' already initiated appellate process.

Turning to the right of appeal, the 1st – 8th respondents relied on the authority of **Richard Nchapi Leiyagu vs. IEBC & 2 Others**; **Mbaki & Others vs. Macharia & Another [2005] 2EA 206;** and the Tanzanian case of **Abbas Sherally** & **Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003** for the holding *inter alia* that (i) the right to a hearing is not only constitutionally entrenched but it is also the cornerstone of the Rule of law (ii) the right to be heard is a valued right; and (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of natural justice; all in further support of their argument that the appeal already filed should be sustained for merit determination.

Lastly, the Court was urged not to apply the threshold in the Supreme Court case **Nicholas Kiptoo Arap Korir Salat vs. I.E.B.C & 7 Others** [supra], one of the authorities relied upon by applicants in support of the application. Instead, we were urged to apply the threshold in **Mombasa High Court Civil Appeal No. 133 of 2014 Charles Githinji Muigwa vs. Charles Kiiru Karanja** as affirmed by the Court of Appeal at Mombasa in Civil Appeal No. 71 of 2016 - **Charles Kiiru Karanja and Charles Githinji Muigwa** in which the Court explicitly stated that the **Nicholas Kiptoo Arap Korir Salat** [supra] case was in respect of **Rule 53** of the **Supreme Court Rules** which has no application to procedures undertaken before any other court.

In support of the 1st – 8th respondents' opposition to the application, **Dr. Muthiomi Thiankolu** for the 63rd and 67th respondents submitted that rules of procedure are not an end in themselves as they are not meant to punish litigants but to facilitate ends of justice especially when it was undisputed that there were court directions that all documents for court processes were to be filed electronically. It is therefore counsel's opinion that in light of the uncontroverted circumstances explained above, the 1st – 8th respondents cannot be blamed for any lapses experienced by the Court in the processing of their appellate papers as they had no control over the filing system. Lastly, that there was no agreement between his clients and applicants herein that parties to the consolidated petitions and who had not filed any application therein but were aggrieved by the decision of the superior Court delivered on 3rd July, 2020 could not exercise their right of appeal.

Counsel concedes that on the material on the record, the impugned notice of appeal appears to have been filed out of time but that concession notwithstanding, it is counsels' opinion that that procedural lapse is not fatal to the 1st – 8th respondents initiated appellate process. The court can apply the overriding objective principle of the Court even *suo motu* and excuse those lapses and sanction the already initiated appellate process for merit determination as ruling otherwise will cause unnecessary delays in the finalization of not only the intended appeal but also the consolidated petitions and on that account prayed for the application to be dismissed. Other participating parties took neutral positions in the application.

In reply to the 1st – 8th, 63rd and 67th respondents' rebuttals, senior counsel **Mr. Ngatia** submitted that the saving power of the Court which the respondents have urged the Court to apply to provide succor for the impugned 1st – 8th respondents appellate process does not apply to applications of this nature but those falling for consideration under the **Rule 4** of the Court's **Rules**. Counsel denied the respondents suggestions that they are punishing individuals. In his opinion all that the applicants have requested of this Court is for the Court to promote principles of law that govern the exercise of its mandate under the **Rules** invoked.

Our invitation to intervene on behalf of the applicants has been invoked under the provisions of law cited in the heading of the application. **Rule 72** has been cited out of context as it deals with arguments on the main appeal. The substantive provisions falling for interrogation are **Rules 75** and **84** of the Court's **Rules** as read with **Rules 77(1**) and **90(1)** and **(2)**. **Rule 75** provides as follows:

> **"75(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.**
>
> **2. Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.**

.....”

While **Rule 84** on the other hand provides as follows:

> **“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.**

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be.” Rule 75 is explicit that a party aggrieved by a decision and desiring to appeal against such a decision has to lodge a notice of appeal within fourteen (14) days of the decision which in the instant application was 3rd July, 2020.

It is common ground that the impugned notice of appeal was not lodged within the timelines stipulated in the said **Rule**. Neither was it served upon the applicants within the seven (7) days of its being lodged, the timeline stipulated in **Rule 77(1)** provides:

> **“An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal**.” [Emphasis supplied].

The 1st – 8th respondents as supported by the 63rd and 67th respondents concede that there was noncompliance with the timelines set in the above two **Rules** of the Court. They however urged the Court to apply the overriding objective principles of the Court enshrined in **sections 3A** and **3B** of the **Appellate Jurisdiction Act**, the non-technicality principle enshrined in **Article 159(2)(d**) of the **Constitution of Kenya 2010**, the inherent power of the Court under **Rule 1(2)** of the Court’s **Rules** and the unfettered discretionary mandate of the Court under **Rule 4** of the Court’s **Rules** and provide succor for the highlighted procedural lapses with a view to saving the already initiated appellate process to go for merit consideration.

This is not the first time this Court is being confronted with such an invitation. It has on numerous occasions expressed itself on this issue. Starting with noncompliance with the timelines within which to serve a notice of appeal, we adopt the position taken by the Court in **Daniel Nkirimpa Monirei vs. Sayialel ole Koilel & 4 Others [2016] eKLR**, wherein it stated that:

> **“Whichever way, one looks at it, there was no service of the Notice of Appeal on the applicant. The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet, as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77 (1) of the Court of Appeal Rules is couched in mandatory terms.”**

On the application of the overriding objective principle, the Court, in the case of **Hunter Trading Company Ltd vs. Elf Oil Kenya Limited, Civil Application No. NAI. 6 of 2010**, stated *inter alia* as follows:-

> **“It seems to us that in the exercise of our powers under the “02 principle” what we need to guard against is any arbitrariness and uncertainty. For that reason, we must insist on full compliance with past rules and precedents which are “02” compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the “02 principle” could easily become an unruly horse.”**

Further in **City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No. 199 of 2008) (unreported)** the Court reiterated that: -

> **“That however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”**

In the case of **Ramji Davji Vekaria vs. Joseph Oyula, [2011] eKLR,** this Court held that lodging an appeal out of time is not a procedural technicality which can be cured by the Court invoking the overriding objective principle as the issue is a substantive one that goes to the core of ensuring that an intended respondent or interested/affected party to an appeal/intended appeal is accorded reasonable time to prepare for an appeal and that this Court can only invoke the overriding objective principle only in well deserving cases, with each case being considered on its own peculiar circumstances. Further in **Murandula Suresh Kantaria vs. Suresh Nanalal Kantaria, Civil Appeal No. 277** of **2005 (unreported)**, the Court added the following:

> **“the overriding principle is not a panacea for all ills and in every situation, and that proper basis must be laid before the Court can invoke the same in favor of a party. In exercising the power to give effect to the principle, the Court must do so judicially and with proper and explicable foundation”**

On the inherent power of the Court, we take it from the case of **Kenya Power & Lighting Company Limited vs. Benzene Holdings Limited t/a Wyco Paints [2016] eKLR** for holding that the Court's inherent power is a residual intrinsic authority which it may resort to in order to put right that which would otherwise be an injustice.

While regarding application for extension of time, the position is as follows was restated by the Supreme Court in **(M.K. Ibrahim & S.C. Wanjala SCJJ)** in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others [2013]eKLR** as follows:-

> **"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; a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court; whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court; whether there will be any prejudice suffered by the respondent of the extension is granted; whether the application has been brought without undue delay; and whether uncertain cases, like election petition, public interests should be a consideration for extending time".**

Taking the totality of the position adopted both by this Court and the Supreme Court in the above highlighted cases as a basis for the respondents' invitation for us to apply principles and propositions enunciated therein to provide succor for the 1st – 8th respondents admitted procedural lapse in the initiation of their appellate process, we find nothing in the above principles to excuse the 1st – 8th respondents' failure to take remedial procedural steps to salvage their undisputed faulty processes as soon as applicants raised the complaints against it. Their inaction is therefore inexcusable especially when the Court in the said authorities explicitly stated that **Rules** of procedures are not for cosmetic value but meant to aid the Court in the exercise of its mandate under the said **Rules** in not only an orderly but also in a predictable manner. Second, the parameters we have been invited to apply to salvage the said appellate process fall for consideration in an application premised on **Rule 4** of the Court's **Rules** and not on applications of this nature. The invitation is therefore declined.

Turning to the exercise of the Court's mandate under **Rule 84**, the first prerequisite is that the application be filed within thirty (30) days of service upon the aggrieved party of either the notice or the record. Herein both processes were served on 13th August, 2020. This application was filed on 19th August, 2020, therefore within the thirty (30) days' timeline provided for in the Rules. It is therefore properly before us.

On merits, this court has on numerous occasions pronounced itself on consequences of non-compliance with the above prerequisites. We take the case of **Patrick Kiruja Kithinji vs. Victor Mugira Marete [2015] eKLR,** for the proposition that issue as to whether or not an appeal is filed on time is a fundamental issue as it goes to the jurisdiction of the Court. Second, that the Court only has jurisdiction to entertain appeals filed within the requisite time and or appeals filed out of time but with the leave of the Court. See also expositions in the following authorities; **Daniel Nkirimpa Monirei vs. Sayialel Ole Koilel & 4 Others [2016] eKLR; Ali K. Ahmed T/A Sky Club Restaurant vs. Kabundu Holdings Limited [2009] eKLR;** and **Kenya Industrial Estates Limited vs. Anne Chepsiror & 4 Others [2018] eKLR**; for the holding *inter alia*, that an appeal filed out of time without leave is a proper candidate for striking out; **Trimborn Agricultural Engineering Limited vs. David Njoroge Kabaiko & Another [2000] eKLR,** for the holding *inter alia* that, a notice of appeal being a primary document is incapable of amendment. Where found defective, it can only be struck out; See **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** for the holding *inter alia* that, a defective notice of appeal ought to be struck out; and, second, that courts cannot sympathize with litigants who failed to follow express rules of procedure, since those rules serve an important purpose in litigation.

We appreciate the 1st – 8th respondents' argument and invitation for us not to apply Supreme Court's holding in the **Nicholas Kiptoo Arap Korir Salat** case [supra] for the reason already highlighted above. We are however of the view that discounting the above decision per se will not aid the 1st – 8th respondents course in their request for us to sustain their admittedly faulty appellate process as we cannot ignore the Court's own stand on such a procedural lapse in similar circumstances as already highlighted above for the sake of consistency, conformity and predictability on the application of the **Rules** of the Court in instances where circumstances of the particular situation do not call for exercise of the Court's discretion to depart from an earlier position. We also add that such departure should be for good reason explained on the record of which we find none herein. As already observed above, nothing prevented the 1st – 8th respondents to take a remedial action such as seeking extension of time to validate the already initiated process, a procedure readily available and within reach.

Turning to the complaint on noncompliance with the timelines within which to serve the opposite party with the record of appeal, **Rule 90(1)** and **(2)** provides as follows:

> **90(1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 79.**
>
> **(2) .....**

As already highlighted above, it is admitted by the 1st – 8th respondents that the record of appeal too was not served within the prerequisite stipulated in **Rule 90(1)** of the Court's **Rules**. No steps were taken to regularize that position. They have instead relied on the same saving principles highlighted above in support of their request to sustain the notice of appeal and which we adopt and similarly apply in vitiating the procedural lapse on noncompliance with **Rule 90(1)** of the Court's **Rules**. We reiterate the position taken above that the only solution to the 1st – 8th respondents both procedural lapses should have been for them to seek to regularize both processes. Second, what the Court has been invited to apply falls for consideration under the **Rule 4** of the Court procedures and not in an application of this nature.

In the result, we find merit in the applicants' application. It is allowed as prayed: that Notice of Appeal dated 22nd July, 2020 and filed in the Employment and Labour Relations Court and served upon the Applicant's counsel on 13th August, 2020 is hereby struck out with costs.

DATED** and **DELIVERED** at **NAIROBI** this **23rd day of April, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE - MAKHANDIA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR