



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: KARANJA, JA. (IN CHAMBERS)**

**CIVIL APPLICATION NO. 180 OF 2020**

**BETWEEN**

**KENYA HUMAN RIGHTS COMMISSION.....APPLICANT**

**AND**

**NUBIAN RIGHTS FORUM.....1ST RESPONDENT**

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....2ND RESPONDENT**

**THE HON. ATTORNEY-GENERAL.....3RD RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF INTERIOR &**

**CO-ORDINATION OF NATIONAL GOVERNMENT.....4TH RESPONDENT**

**THE PRINCIPAL SECRETARY, MINISTRY OF INTERIOR &**

**CO-ORDINATION OF NATIONAL GOVERNMENT.....5TH RESPONDENT**

**THE DIRECTOR NATIONAL REGISTRATION.....6TH RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF INFORMATION,**

**COMMUNICATION & TECHNOLOGY.....7TH RESPONDENT**

**THE SPEAKER, NATIONAL ASSEMBLY.....8TH RESPONDENT**

**KENYA LAW REFORM COMMISSION.....9TH RESPONDENT**

**CHILD WELFARE SOCIETY.....10TH RESPONDENT**

**AJIBIKA SOCIETY.....11TH RESPONDENT**

**MUSLIMS FOR HUMAN RIGHTS INITIATIVE.....12TH RESPONDENT**

**HAKI CENTRE.....13TH RESPONDENT**

**LAW SOCIETY OF KENYA.....14TH RESPONDENT**

**INFORM ACTION.....15TH RESPONDENT**

**BUNGE LA MWANANCHI.....16TH RESPONDENT**

*Being an application for extension of time to file a Record of Appeal out of time in an intended appeal from the Judgment and Decree of High Court of Kenya at Nairobi (W. Korir, P. Nyamweya and M. Ngugi, JJ.) dated 30th January 2020*

*in*

**Consolidated Constitutional Petitions**

**No. 56, 58 & 59 of 2019)**

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**RULING**

1. Before me is the Applicant's motion on notice dated 29th June, 2020 brought under Section 3A, 3B of the Appellate Jurisdictions Act and Rules 4, 82(1) and (2) of the Court of Appeal Rules seeking an extension of time to file an appeal arising from the judgment of the High Court granting, *inter alia*, the following orders: A declaration that the collection of DNA and GPS co-ordinates for purposes of identification is unconstitutional and a violation of Article 31 of the Constitution; In so far as section 5(1)(g) and 5(1)(h) of the Registration of Persons Act requires the collection of GPS coordinates and DNA, the said subsections are in conflict with Article 31 of the Constitution and are to that extent unconstitutional, null and void and; The 3rd to 9th respondents herein are at liberty to proceed with the implementation of the National Integrated Identity Management System (NIIMS) and to process and utilize the data collected in NIIMS, only on condition that an appropriate and comprehensive regulatory framework on the implementation of NIIMS that is compliant with the applicable constitutional requirements identified in this judgment is first enacted.
2. The application is supported by the affidavit of Jackson Awele Onyango, Advocate, counsel for the applicant. He application was heard by way of video link in absence of counsel on the basis of written submissions on record. In his affidavit, Mr Awele deposes that the Notice of Appeal was filed and lodged within 14 days as prescribed under Rule 75 of the Court of Appeal Rules. However, the letter bespeaking the typed proceedings from the High Court was not served upon the respondents basing such failure on an error and/or regrettable oversight on the part of counsel which was only discovered at the time of preparation of the record of appeal. He maintains that the same was promptly remedied with no prejudice occasioned on the respondents and that the said lapse ought not be visited on the Applicant. (See: **Belinda Murai & 9 Others v. Amos Wainaina (1979) eKLR**).
3. Counsel deposes further that on 24th June, 2020, upon being notified that the typed proceedings were ready for collection, he promptly paid the requisite court fees and collected the proceedings on the same day. Further, that the Record of Appeal was then prepared, scanned, filed and served on 29th June, 2020, exactly five (5) days from the date of collection of the typed proceedings, and bearing in mind the voluminous size of the record (6236 pages) and the effort put to scan, paginate and number, counsel acted with speed and alacrity to file and serve the appeal as soon as the same was possible.
4. Counsel contended that the Constitutional Petitions giving rise to the intended appeal concern weighty, complex, novel, sensitive and intimate constitutional issues around the right to privacy and equal protection of the law which are matters of general public importance.
5. The 3rd respondent opposed the instant application but did not file its replying affidavit. In its written submissions, counsel submitted that it is common ground that when the applicant filed the present application on the 29th of June, 2020, the applicant was out time by 76 days. He maintained that the discretion of a single judge is wide and unfettered.
6. Counsel argued that the applicant's explanation for delay, that there was inadvertence on the part of the applicant's counsel's clerk, was somewhat general and inexcusable and that the same demonstrated that the applicant was indolent. He maintained that the 3rd respondent would be prejudiced by the extension as the same would violate public policy considerations of expeditious resolution of disputes. Further, that taking into account the circumstances of the case, the delay in filing the appeal/seeking time for extension has not been properly explained.
7. He maintained that the applicant had not attempted to explain at all the prima facie chances of success of the appeal and that in any event, the intended appeal does not have any chances of success and is only calculated to further delay the implementation of a very important national project. He urged the Court to dismiss the application.
8. The 4th and 5th respondents opposed the application vide a replying affidavit sworn by Philip Lemarasia, the Project Coordinator of NIIMS. In the 4th and 5th respondents' written submissions, counsel reiterated the averments in the replying affidavit. He echoed the 3rd respondent's submissions save that: despite the applicant realizing that the letter requesting for the typed proceedings of the impugned judgment, it has not taken any steps to remedy the same and; the applicant has not demonstrated that the intended appeal *prima facie* has high chances of success.
9. The 6th and 9th respondents did not file their replying affidavit. However, they opposed the application vide written submissions in which counsel reiterated the 3rd, 4th and 5th respondents' arguments save: that the applicant had not produced any affidavit evidence by the counsel's clerk through whose mistake the letter requesting for proceedings was not served upon the respondents; that having failed to serve the said letter, it was immaterial whether a certificate of delay was issued or not as such failure was an infringement of the respondents' right to a fair trial. (See: **Justus Aloo Ogeka & 6 Others v. Kenya Union of Commercial Food and Allied Workers Union & 2 Others (2018)**)

eKLR); that the Record of Appeal filed after 13th April 2020 was filed without leave of Court and; that failure to file an appeal out of time is not a procedural technicality and goes to the jurisdiction of this Court. (See: **Honourable Lemanken Aramat v. Harum Meitambei Lempaka & 2 Others** Petition No. 5 of 2014).

10. The 7th respondent also did not file its replying affidavit. In its written submissions, counsel submitted resonating with the 3rd, 4th and 5th and 6th and 9th respondents' submissions save that: the provisions of section 3A and 3B of the Appellate Jurisdiction Act are intended to facilitate the just and expeditious disposal of appeals and not to assist indolent litigants and; that Article 159 of the Constitution doesn't supply a blanket exercise of discretion in an unexplained blatant failure to obey this Court's rules.

11. The principles that guide this Court in an application such as this are well settled. The Court ought to exercise its unfettered discretion while considering factors including: the period of delay; the reason for the delay; the chances of success of the intended appeal in the event that the application is granted; and the degree of prejudice that the respondent is likely to suffer if the application is allowed, among other considerations. (See: **Stanley Kahoro Mwangi & 2 Others v. Kanyamwi Trading Company Limited** (2015) eKLR).

12. Also, in **Habo Agencies Limited v. Wilfred Odhiambo Musingo** [2015] eKLR, Waki JA in his decision, as upheld by the full bench of this Court on a reference, stated as follows:-

*“I am aware that the discretion I have to exercise under Rule 4 is unfettered and does not require establishment of “sufficient reasons”. Indeed, I stated as much as a single judge and was upheld by the full court in Fakir Mohamed vs Joseph Mugambi & 2 Others Civil Appl. 332/04 (UR), thus:-*

*“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. 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 the 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: See Mutiso vs Mwangi, Civil Application No. Nai. 255 of 1997 (UR), Mwangi vs Kenya Airways Ltd [2003] KLR 486, Major Joseph Mwereri Igweta vs Murika M’Ethare & Attorney General, Civil Application No. Nai. 8 of 2000 (UR) and Murai vs Wainaina (No. 4) [1982] KLR 38”.*

13. It is undisputed that the judgment of the trial court was delivered on 30th January, 2020 and that the notice of appeal was lodged on 12th February, 2020 which was within the prescribed time. It is not disputed either that the appellant's counsel requested for the typed proceedings vide the letter court stamped at the High Court registry on 13th February, 2020. It would, therefore, appear that the main issue here is the failure to serve the said letter on counsel on record for the respondents. It is a legal required that the letter be served on the respondents before a party can seek leverage on the proviso to **Rule 82 (1)** of the Court of Appeal Rules.

14. The issue at hand is whether there is placed before me good reasons as to why I should exercise my unfettered discretion in favour of the applicant bearing in mind the principles set out in the cases cited above. Although learned counsel for the applicant attributes non service of the letter bespeaking the proceedings on an unnamed clerk, he appears candid enough to take responsibility for the default. I am persuaded that failure to serve the letter in question on time can be excused. Was the delay in serving the letter in question inordinate? I note that even though the said letter had not been served on the respondents, none of them had moved the Court to strike out the appeal upon expiry of the 60 days provided for under the rules. This could have been due to the fact that the parties were engaged in the hearing of the Rule 5 (2) b application which was filed subsequently. The long and short of this is that the respondents were all along aware of the subsistence of the appeal and they were not therefore labouring under the false impression that the appellant had abandoned its appeal.

15. On whether the appeal has chances of succeeding, success of the appeal will be an issue for the bench that will eventually be tasked with hearing the appeal itself. I can however say that the appeal is not frivolous and I appreciate the fact that it raises important constitutional issues of public interest that call for determination by this Court. These far outweigh the failure to serve the letter bespeaking the proceedings on time.

16. On the question of prejudice, the respondents have not demonstrated what prejudice they stand to suffer if the appeal is heard and determined on merit, particularly in view of the public interest involved.

17. For the foregoing reasons, I find merit in the application at hand. I allow it and extend time for filing the record of appeal. The record of appeal which has already been filed out of time be deemed as having been filed within time. I also order that the appeal be served on all the respondents within 14 days from the date hereof. This being a public interest matter, I make no order as to costs.

**Dated and delivered at Nairobi this 6th day of November, 2020**

**W. KARANJA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**