



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: KARANJA, J.A (IN CHAMBERS))**

**CIVIL APPLICATION NO. 58 OF 2018**

**BETWEEN**

**OKIYA OMTATAH OKOITI.....APPLICANT**

**AND**

**KENYA POWER AND LIGHTING COMPANY.....1ST RESPONDENT**

**AMU POWER COMPANY LIMITED.....2ND RESPONDENT**

**ENERGY REGULATORY COMMISSION.....3RD RESPONDENT**

**PRINCIPAL SECRETARY, THE NATIONAL TREASURY...4TH RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF ENERGY &**

**PETROLEUM.....5TH RESPONDENT**

**HON. ATTORNEY GENERAL.....6TH RESPONDENT**

**THE NATIONAL ENVIRONMENT MANAGEMENT**

**AUTHORITY (NEMA).....7TH RESPONDENT**

**SAVE LAMU.....8TH RESPONDENT**

**THE KENYA NATIONAL COMMISSION ON HUMAN**

**RIGHTS.....9TH RESPONDENT**

**THE KENYA HUMAN RIGHTS COMMISSION.....10TH RESPONDENT**

**THE NATIONAL ENVIRONMENT TRIBUNAL.....11TH RESPONDENT**

*(Being an application for extension of time to serve the Notice of Appeal out of time in an appeal from the ruling and order of the High Court of Kenya at Malindi (J.O Olola, J) dated and delivered on 21ST March, 2018*

in

E&LC Petition No. 14 of 2017)

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**RULING**

1. Before me is an application for enlargement of time to serve Notice of Appeal, pronounced to be brought under **Rules 1(2) ,4, 53(1) and 77 of the Court of Appeal Rules (the Rules)**, dated 7th May, 2018 by the applicant, **Okiya Omtata Okioti** in which he prays for orders as follows:-

a) that this Court be pleased to extend time and grant leave to serve the Notice of Appeal herein on the respondents out of time in the appeal from the ruling/order of the High Court given in Malindi, in the **Environment and Land Court Petition No.14 of 2017**;

b) that the Notice of Appeal dated **21<sup>st</sup> March, 2018** and served on the respondents on **7<sup>th</sup> May, 2018**, being the Notice of Appeal in the intended appeal, be deemed to have been duly served within the said extended time prescribed by this Court; and

c) ...such other or further orders as may be made to meet the ends of justice and to safeguard and protect the authority and dignity of this Court and the rule of law.

2. It is premised on not less than 20 prolix grounds most of which are repeated several times. It is supported by an equally long affidavit sworn on even date. The gist of the said grounds and the deponents contained in the said affidavit is that the impugned Ruling was given on 21st March, 2018; the Notice of Appeal though filed on time was served outside the time prescribed by the Rules of the Court; the delay was occasioned by the applicant's limited financial resources ; the matter is a public interest one; the respondents will not suffer any prejudice if application is allowed; the intended appeal is arguable and raises weighty triable issues and lastly the often misconstrued and utterly erroneous proposition that the default is curable under Article 159 (2) (d) of the Constitution of Kenya 2010. I say totally erroneous because this Court has pronounced itself on the applicability of Article 159(2) (d) of the Constitution *vis a vis* statutory Rules on many occasions and I do not need to delve into that discourse for purposes of this Ruling. Suffice to say that serving a Notice of Appeal out of time without leave of the Court is not a procedural technicality, but rather, a jurisdictional one.

3. In his oral highlights before the Court, Mr. Omtatah reiterated the contents of his affidavit, his written submissions and list of authorities and in particular the decision in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 6 Others (2013) eKLR**. The applicant further asserted that the respondents failed to demonstrate any prejudice suffered on account of late service of the Notice of Appeal as the appeal had already been filed. The applicant also urged the court to consider that the intended appeal involved matters of public interest as among the prayers sought was a declaration that **section 58(2) of the Environmental Management and Co-ordination Act (EMCA)** is unconstitutional. Tagging on this public interest aspect, Mr. Omtatah urged the court not to condemn him to costs.

4. The application is opposed by the 1st to 6th respondents on a common footing that the reason advanced for extension of time is not justifiable to enable this Court exercise its unfettered discretion in favour of the applicant. The 8th respondent (**Save Lamu**) supports the application and entreated the Court to extend time saying that no prejudice will be occasioned to the other respondents in the event the application is allowed.

5. The 1st Respondent through Robson Harris & Company Advocates filed grounds of opposition on 13th September, 2018. In the said grounds, the 1st respondent urges the Court to dismiss the application on grounds that Section 77 (1) of the Court of Appeal Rules (**the Rules**) is couched in mandatory terms, and that the delay of 41 days has not been explained.

6. The 2nd respondent through the replying affidavit sworn by Cyrus Maina, its Chief Operating officer also reiterated that the delay has not been adequately explained. According to the 2nd respondent, the applicant was just indolent in not following up the matter and such indolence should not be condoned by the Court. The 2nd respondent further deposed that the substratum of the appeal is no longer in existence as the appeal before the National Environment Tribunal on the same subject matter has been heard and was pending judgment. He urged the Court not to allow the application.

7. 3rd, 4th, 5th and 6th respondents opposed the application through their submissions. Given that the principles guiding courts in determining whether or not to extend time are the same, these submissions principally addressed similar issues. The other respondents did not participate in the application. I have carefully considered the application, the grounds of objection, rival submissions both written and oral and the law as espoused by the authorities cited therein.

8. As stated earlier, this is a Rule 4 application. **Rule 4** provides that;

***“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.”***

The order sought is at the discretion of the Court. This discretion though unfettered, must however be exercised judicially and not whimsically or capriciously. Towards this end several principles or guidelines have been settled and the courts pay homage to these guidelines when considering applications such as the one before me. These principles were succinctly restated in the case of **Fakir Mohammed v Joseph Mugambi & 2 Others**, [2006] eKLR, where this Court rendered itself 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 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.”*

*The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In Mwangi V. Kenya Airways Ltd, [2003] KLR 48, the Court having set out matters which a single Judge should take into account when exercising the discretion under Rule 4 went on to hold:-*

*“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”*

I will therefore be guided by the above guidelines to decide whether this application should be allowed or not. In doing so however I will also consider the reasons proffered by the applicant for the delay of 40 + days. This Court in Habo Agencies Limited vs Wilfred Odhiambo Musingo [2015]eKLR citing the time honoured Privy Council case of Ratnam vs Cumarasamy [1964]3ALLER 933 reiterated:-

*“...in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. And it is worth repeating that if a law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the Rules, which is to provide a timetable for the conduct of litigation.....Nevertheless, there must be some material on which the court can exercise its discretion.”*

9. What material has the applicant placed before me to justify an order for extension of time? It is common ground the impugned Ruling was rendered on 21st March, 2018. The applicant lodged the Notice of Appeal before the ELC the same day. The same was then transmitted and accepted by the Court of Appeal registry on 27th March, 2018. According to the applicant, the registry was not able to process the Notice of Appeal the same day and so he was not able to go back to Nairobi with it for purpose of service on the respondents. That may be so but has the applicant explained why he could not come back to Malindi in the next 7 days to collect the Notice of Appeal and serve it on time? Has he adequately explained why it took him another 40 days plus to serve the Notice of Appeal?

10. The explanation he has given is that he works in the “public interest on a self-financed shoe string budget” and faces logistical challenges operating in the courts in Malindi. His other reason is that the respondents will suffer no prejudice as he has already served them and further that since the matter is in public interest he should be indulged, and lastly that he has a good appeal and late service should not stand in the way of substantive justice.

11. All the respondents who participated in the matter save for 8th respondent submitted that the delay or the logistical problems cited have not been adequately explained. Learned counsel submitted that the appeal is frivolous and informed the Court that the matter has already been heard before the tribunal and was pending judgment. Moreover, according to the 2nd respondent even the application before court was filed some 10 days after the late service of the Notice of Appeal.

12. On the issue of public interest, counsel urged this Court to hold and find that precisely because a matter is in the public interest requires that a party handling it proceeds with a modicum of diligence and scrupulousness as was held by this Court in Japheth Muroko & Anor v Independent Electoral & Boundaries Commission & 2 others

**Election Petition Appeal No. 1 of 2018 (unreported)** where the Court expressed:-

*“In our view it cannot fall from the mouths of the appellants to criticize the learned judge for alleging failure to appreciate and give effect to the public interest in the petition. Precisely because of the petition’s public interest, the 1st and 2nd appellants who had taken it upon themselves to file it were expected to proceed with a modicum of diligence and scrupulousness, consistent with people pursuing a matter of great interest to themselves and to the public in general. Instead they proceeded as if they were at liberty to drag their feet, while it was the court’s obligation to tag along, for the sake of public interest. The 1st and 2nd appellants cannot be allowed to blow hot and cold at the same time, their words asserting the public importance of election petitions and by their actions proceeding as if those petitions are of no moment. They also missed the point that public interest has no room for dilatoriness in resolution of legal disputes and may sometimes demand exactly what the learned judge held.”*

A party who takes up litigation in the public interest should not expect to be exempted from compliance with Court Rules and regulations and must be ready to fully comply with the law just like any other litigant, for indeed all parties are equal in the eyes of the law. Parity of arms must never be taken for granted if justice is to be seen to be done to all parties. I am not persuaded that the issue of public interest raised herein in absence of any other convincing reason should entitle the applicant to extension of time.

13. On the issue of delay, the applicant placed heavy reliance on the case of Kamlesh Mansukhalal Damji Pattni v Director of Public Prosecutions & 3 others (2015) eKLR Civil Appeal (Application) No. 120, 105 & 168 (A) of 2013 (Consolidated). The Court however notes that the delay sighted in that case was only for one day. In this case, there is no plausible explanation given for the delay of over 40 days, and another

10 days delay in filing this application after serving the Notice of Appeal late. I appreciate the applicant's profound apology for the delay but that is not enough. As stated earlier, some credible material has to be placed before the Court to enable it exercise its discretion in favour of the applicant. There is paucity of material placed before me to enable me exercise my discretion in favour of the applicant. Sympathy cannot suffice. I must however, applaud Mr. Omtatah for being an indefatigable and zealous defender of the rights of the common citizen (**Wanjiku**). He should nonetheless be careful not to bite more than he can chew as he is only human and he cannot be in more than one court at the same time.

14. On the question of prejudice, clearly dragging all these parties to Malindi to defend the matter with the possibility of not getting costs is of itself prejudice. Although I do not wish to delve into this issue, there are also submissions that the same parties have had to defend the same issues before the tribunal and they feel they are being exposed to double jeopardy

15. I believe I have said enough to demonstrate that this application is for disallowing. The Notice of motion dated 16th May, 2018 is hereby dismissed. Lastly, on the issue of whether costs are payable, the applicant urged that costs follow the cause, and in the event the application is allowed, then he should be awarded costs. He relied on the *ratio decidendi* in **Erick Okeyo v. County Government of Kisumu & 2 Others (2014) eKLR**. In the same breath, the applicant implored the Court not to award costs to the respondents in the event the application is not successful on the basis that the intended appeal was filed between a private citizen and the State. He should not however blow hot and cold at the same time. However, given the financial standing of the parties herein, I will not award costs to the respondents, and therefore order each party to bear its own costs.

**Dated and delivered at Malindi this 20th day of March, 2019**

**W. KARANJA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**