



Export Processing Zones Authority v KM (Minor suing through mother and best friend SKS) & 16 others (Petition (Application) E019 of 2023) [2024] KESC 4 (KLR) (1 March 2024) (Ruling)

Neutral citation: [2024] KESC 4 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) E019 OF 2023
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, I LENAOLA & W OUKO, SCJJ
MARCH 1, 2024**

BETWEEN

EXPORT PROCESSING ZONES AUTHORITY PETITIONER

AND

**KM (MINOR SUING THROUGH MOTHER AND BEST FRIEND
SKS) 1ST RESPONDENT**

IRENE AKINYI ADHIAMBO 2ND RESPONDENT

MILLICENT ACHIENG AWAKA 3RD RESPONDENT

ELIZABETH FRANCISCA MWAIL 4TH RESPONDENT

ELIAS OCHIENG 5TH RESPONDENT

JACKSON OSEYA 6TH RESPONDENT

HAMISI MWAMERO 7TH RESPONDENT

DANIEL OCHIENG OGOLA 8TH RESPONDENT

MARGARET AKINYI 9TH RESPONDENT

**CENTRE FOR JUSTICE, GOVERNANCE AND ENVIRONMENTAL ACTION
(SUING ON BEHALF OF THE RESIDENTS OF OWINO UHURU VILLAGE IN
MIKINDANI, CHANGAMWE AREA, MOMBASA 10TH RESPONDENT**

THE ATTORNEY GENERAL 11TH RESPONDENT

**CABINET SECRETARY MINISTRY OF ENVIRONMENT WATER AND
NATURAL RESOURCES 12TH RESPONDENT**

CABINET SECRETARY MINISTRY OF HEALTH 13TH RESPONDENT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 14TH
RESPONDENT**



COUNTY GOVERNMENT OF MOMBASA 15TH RESPONDENT
METAL REFINERY EPZ LTD 16TH RESPONDENT
PENGUIN PAPER AND BOOK COMPANY... 17TH RESPONDENT

(Being application for extension of time to file and serve a cross appeal out of time)

RULING

Representation:

Mr. Edmond Wesonga for the petitioner

(Wekesa & Simiyu Advocates)

Mr. Onyango and Mr. Odongo for the 1st to the 10th respondents

(Olel Onyango Ingutiah and Company Advocates)

Mr. Liech and Mr. Gatheru for the 14th respondent

(Murugu, Rigoro & Company Advocates)

Mr. Mummin holding brief for Mr. Kibara for the 15th respondent

(Muturi Gakuo & Kibara Advocates)

1. Upon perusing the Notice of Motion dated 26th January, 2024 by the 14th respondent, filed pursuant to articles 48 and 50(1) of the Constitution and rule 15(2) of the Supreme Court Rules, 2020 seeking leave of the court to extend time within which to file and serve a cross appeal to enable the 14th respondent to cross appeal against Civil Appeal No. E019 of 2023 as consolidated with Civil Appeal No. E021 of 2023; and
2. Upon perusing the affidavit sworn by Erastus K. Gitonga, the acting Director Legal Services of the 14th respondent on 26th January, 2024 in support of the motion and written submissions of even date that; the time to file and serve the record of cross appeal has lapsed, necessitating seeking and obtaining leave of court before filing the record of appeal; the delay was occasioned by intervening circumstances beyond the 14th respondent's control, being the strict and rigorous public procurement process; the 14th respondent, being a public entity established under article 260 of the Constitution and section 7 of the Environmental Management and Co-ordination Act, 1999, is strictly bound by the provisions of the Public Procurement and Asset Disposal Act, 2015 and was required to hire legal counsel to act for it in the instant appeals; the 14th respondent begun the procurement process for legal services vide tender No. NEMA/T/12/2023-2024 advertised on 29th November, 2023, which process ended in January, 2024 with the successful bidders being the firm of Messrs Murugu Rigoro & Co. Advocates; after notification of their successful bid vide letter dated 11th January, 2024, the said firm duly accepted vide letter dated 15th January, 2024, with execution of the formal contract for provision of legal services taking place on 25th January, 2024; upon receiving proper instruction on 25th January, 2024 the firm moved with alacrity, came on and filed responses to the two petitions along with the present application. The 14th respondent further contends that it has satisfactorily explained the reason for the delay, which delay, was not deliberate, and it considers not to be inordinate in the circumstances of the case; the parties will not be prejudiced if the application is allowed as the instant appeals are yet



to be set down for hearing; and that the intended cross appeal is not frivolous as it raises weighty issues for the determination of this Court

3. Upon noting that the 1st to 10th respondents in their replying affidavit sworn by Phyllis Issa Indiatsi Omido, the 10th respondent's Executive Director on 31st January, 2024 and written submissions of even date are opposed to the application on grounds that: the application is an afterthought intended to delay the expeditious disposal of the consolidated appeals; the reason provided for the delay is an excuse noting that while before both the Environment and Land Court as well as the Court of Appeal, the 14th respondent was ably represented by Erastus K. Gitonga Advocate, the 14th respondent's acting Director of Legal Services; there is no explanation proffered why counsel Erastus K. Gitonga, failed to file an appeal to comply with the strict timelines under the rules of this Court, even if he would eventually hand the matter over to outside counsel; judgment by the Court of Appeal was delivered on 23rd June, 2023, Petition E021 of 2023 was filed on 7th August, 2023 and Petition E019 of 2023 was filed a few days earlier, while the tender by the 14th respondent for the provision of legal services for the two petitions was floated on 29th November, 2023, five(5) months after the judgment was delivered and three (3) months after the petitions were filed; the 14th respondent has failed to explain the apparent indolence and in the absence of such, there is no basis for the delay and lapse cannot be excused; further the 14th respondent's application and attempt to file a cross appeal will cause serious delay in the disposal of the matter, which delay is extremely prejudicial to the 1st to 10th respondents, who the High Court and Court of Appeal found to be victims of horrendous pollution and poisoning, hence were in need of medical intervention to alleviate some of their suffering; the interests of the 14th respondent must be balanced against those of the 1st to 10th respondents; the 14th respondent will not be condemned unheard as it still has the opportunity to file responses to the petitions.

Having considered the application, responses and submissions before us, We Now Opine as follows:

4. Appreciating that the court, under rule 15(2) of the *Supreme Court Rules*, 2020 has discretionary powers to extend the time limited by the rules or by any of its decisions; that any person intending to cross appeal is required by rule 47(2)(b) of the *Supreme Court Rules*, 2020 to file lodge their memorandum of appeal and record of appeal within thirty days of service, or not less than thirty days before the hearing of the appeal, whichever is the later. Rule 47 provides as follows;
 - “(1) A respondent who intends to cross-appeal shall specify the grounds of contention, and the nature of the relief that the respondent seeks from the Court.
 - (2) The respondent shall—
 - (a) provide contact details including the names, postal address, telephone number and email address of any persons intended to be served with the notice; and
 - (b) lodge eight copies of the memorandum of appeal and record of appeal in the registry within thirty days of service upon the respondent, or not less than thirty days before the hearing of the appeal, whichever is the later.
 - (3) An application or notice to cross-appeal shall be as set out in Form I of the First Schedule.” (Emphasis added)



5. Considering that the 14th respondent lodged their Notice of Appeal dated 26th January, 2024 in the Court's registry on 5th February, 2024 wherein it specifies the grounds of contention, and the nature of the reliefs it intends to seek;
6. Bearing in mind that this matter, being the consolidated appeals Petition E021 of 2023 and Petition E019 of 2023, is still undergoing the compliance process before the Deputy Registrar in preparation for being set down for hearing, which process has been held up by the instant application;
7. Further considering that due to this, the 14th respondent is still within time to file its cross appeal, in any case, not later than thirty (30) days before the hearing of the appeal, once a date is set down;
8. For the aforesaid reasons, we find that the 14th respondent was not required to obtain leave of the court, rendering the instant application entirely unnecessary. Be that as it may, in the circumstances we are minded to allow the application and to further direct that, for good order, the 14th respondent should proceed to file its memorandum of appeal and record of appeal within fourteen (14) days of this ruling;
9. As regards costs, in the case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate of & 4 others*, SC. Petition No. 4 of 2012; [2013] eKLR it was settled that costs follow the event and that the Court may in appropriate cases exercise discretion and decide otherwise. Given that the instant application was entirely superfluous and could have been avoided had counsel for the 14th respondent perused the Rules of this Court, we find it judicious for the applicant, the 14th respondent to bear the costs of this application.
10. Accordingly, we are persuaded in the circumstances, to make the following orders:
 - a. The notice of motion dated 26th January, 2024 be and is hereby allowed;
 - b. The applicant to file and serve its memorandum of appeal and record of appeal within fourteen (14) days of delivery of this ruling;
 - c. The applicant to bears the costs of the application
 Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF MARCH, 2024.

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P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA



JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

