



REPUBLIC OF KENYA



**Kenya Agricultural Research Institute v Kariuki & 16 others (Application E001 of 2023) [2023] KESC 25 (KLR) (Civ) (21 April 2023) (Ruling)**

Neutral citation: [2023] KESC 25 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**CIVIL**

**APPLICATION E001 OF 2023**

**PM MWILU, DCJ & VP, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

**APRIL 21, 2023**

**BETWEEN**

**KENYA AGRICULTURAL RESEARCH INSTITUTE ..... APPLICANT**

**AND**

**PETER WAMBUGU KARIUKI & 16 OTHERS ..... RESPONDENT**

*(Being an application for extension of time within which to file and serve a Notice of Appeal)*

**Guiding principles in extension of time to file appeals at the Supreme Court**

*The instant application sought the extension of time within which to file and serve a notice of appeal. The court reiterated the guiding principles in extension of time. The court found that though the Supreme Court Rules, 2020 did not prescribe a timeline within which a party must seek certification, a period of over seven (7) months without explanation could not be termed as reasonable.*

Reported by Kakai Toili

***Civil Practice and Procedure** - appeals - appeals to the Supreme Court - timelines for filing appeals - where there was a delay of seven months in filing an application for certification - extension of time - guiding principles in extension of time - whether a delay of 7 months in filing an application for certification without explanation was reasonable -, rules 15(2) and 36(1).*

**Brief facts**

The instant notice of motion application sought the extension of time within which to file and serve a notice of appeal. The applicant was aggrieved by two related decisions of the Court of Appeal and preferred an application for review. The applicant being dissatisfied with the decision of the Court of Appeal in dismissing its review application filed a notice of appeal dated May 11, 2022, on May 17, 2022, five (5) days late and served the same on the respondent on May 20, 2022.

The applicant claimed that the delay was inadvertent as it was due to the complexity of the issues as well as seeking approval following its internal protocols being a State corporation. Further, that the failure to file and



serve the notice of appeal within time was also not intentional but due to counsel's failure to advise the court clerk of the urgency of the matter and the deadline of May 12, 2022.

### **Issues**

What were the guiding principles in extension of time and whether a delay of 7 months in filing an application for certification without explanation was reasonable.

### **Held**

1. The court, under rule 15(2) of the had unfettered discretionary powers to extend the time limited by the Rules or by any of its decisions. Any person intending to appeal to the court was required by rule 36(1) of the , to file a notice of appeal within fourteen days from the date of the decision intended to be challenged.
2. The guiding principles in extension of time were;
  1. extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;
  2. a party who sought for extension of time had the burden of laying a basis to the satisfaction of the court;
  3. whether the court should exercise the discretion to extend time, was a consideration to be made on a case-to-case basis;
  4. whether there was a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  5. whether there would be any prejudice suffered by the respondents if the extension was granted;
  6. whether the application had been brought without undue delay; and
  7. whether in certain cases, like election petitions, public interest should be a consideration for extending time.
3. The initial delay of five days in filing the notice of appeal was not inordinate and had been sufficiently explained by counsel. Be that as it may, the delay that concerned the court was from service of the notice of appeal on May 20, 2022 to January 18, 2023 when the applicant elected to pursue an appeal before the Supreme Court, and in noting the error filed the instant application; a period of over seven (7) months. Though the did not prescribe a timeline within which a party must seek certification, a period of over seven (7) months without explanation could not be termed as reasonable. Rule 38 of the required the institution of an appeal within thirty (30) days from either the date of filing the notice of appeal or after the grant of certification, demonstrating the need to move with speed in pursuing an appeal before the court.
4. Extension of time was an equitable remedy, the grant of which involved the exercise of judicial discretion. Equity aided the vigilant and not the indolent. The court had great difficulty reconciling a party that lodged its notice of appeal on May 17, 2022, on August 2, 2022 released funds to its opponents in fulfilment of the judgment of the Court of Appeal yet waited another five (5) months before arriving at a decision to pursue an appeal to the instant court by way of certification. The concept of timelines and timeliness was a vital ingredient in the quest for efficient and effective governance under the which must be adhered to. The applicant's explanation in the circumstances was neither reasonable nor satisfactory and great prejudice would be occasioned to the respondents if the application was to be allowed.

*Application dismissed.*

### **Orders**

*Applicant to bear the costs of the application.*

### **Citations**

### **Cases**



1. Base Titanium Limited v County Government of Mombasa & Another (Petition 22 of 2018; [2019] KESC 9 (KLR)) — Followed
2. Commissioner of Police & 2 others v Joseph Mburu Gitau & 634 others (Civil Appeal 227 of 2011; [2020] KECA 380 (KLR)) — Followed
3. County Executive of Kisumu v County Government of Kisumu & 8 others (Civil Application 3 of 2016; [2017] KESC 16 (KLR)) — Followed
4. Geo Chem Middle East v Kenya Bureau of Standards (Petition 47 of 2019; [2020] KESC 1 (KLR)) — Followed
5. Hassan Nyanje Charo v Khatib Mwashetani & 3 others (Civil Application 23 of 2014; [2014] KESC 5 (KLR)) — Followed
6. John Ochanda v Telkom Kenya Limited (Motion 24 of 2014; [2014] KESC 7 (KLR)) — Followed
7. Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014; [2014] KESC 12 (KLR)) — Followed
8. Seventh Day Adventist Church East Africa Ltd & 2 Others v Masosa Construction Company (Civil Appeal 157 of 2006; [2012] KECA 43 (KLR)) — Followed

#### Statutes

1. Supreme Court Rules, 2020 — Rule 15; (2), 36; (1) — Interpreted

#### Advocates

None mentioned

### RULING

1. Upon perusing the notice of motion by the applicant dated January 20, 2023 and filed on January 26, 2023, anchored on rule 15(2) of the *Supreme Court Rules, 2020* seeking for extension of time within which to file and serve a notice of appeal and costs of the application; and
2. Upon considering the grounds on the face of the application and the two supporting affidavits both sworn on January 20, 2023 by Albert Wafula Munyakho, the applicant's learned counsel and the learned counsel's court clerk Onesmus Kisinga together with written submissions dated January 20, 2023 and filed on January 26, 2023, we note that the applicant was aggrieved by two related decisions of the Court of Appeal in Civil Appeal No 271 of 2015 *Peter Wambugu Kariuki & 16 others v Kenya Agricultural Research Institute* and Civil Appeal No 315 of 2015 *Kenya Agricultural Research Institute v Peter Wambugu Kariuki & 16 others* delivered on October 18, 2018 and December 21, 2018 respectively and preferred an application for review. The applicant being dissatisfied with the decision of the Court of Appeal delivered on April 28, 2022 in dismissing its review application, filed a notice of appeal dated May 11, 2022, on May 17, 2022, five (5) days late and served the same on the respondent on May 20, 2022. Applicant's counsel contends that it was upon receiving instructions in January, 2023 to proceed with seeking certification in order to pursue an appeal that they noticed the error. Counsel relies on the cases of *Seventh Day Adventist Church East Africa Ltd & 2 Others v Masosa Construction Company* [2006] eKLR and *Commissioner of Police & 2 others v Joseph Mburu Gitau & 641 others* [2019] eKLR by the Court of Appeal to urge that the delay was inadvertent as it was due to the complexity of the issues as well as seeking approval following the applicant's internal protocols being a state corporation. Further, that the failure to file and serve the notice of appeal within time was also not intentional but due to counsel's failure to advise the court clerk of the urgency of the matter and the deadline of May 12, 2022.
3. The applicant contends that the intended appeal raises grounds of general importance as the impact of the two conflicting decisions of the Court of Appeal arising from the same subject matter create huge



public interest in the certainty, consistency and overall resolution of the disputes within the Judiciary. Further, relying on the decision in *John Ochanda v Telkom Kenya Limited; SC Motion No 24 of 2014* [2014] eKLR, it is contended that the respondents, having been served with the notice of appeal on May 20, 2022, have been aware of the applicant's intention to appeal to the Supreme Court and will not suffer any prejudice which cannot be adequately compensated by an order of costs.

4. Upon perusing the respondents' replying affidavit sworn by Peter Wambugu Kariuki, the 1<sup>st</sup> respondent, on February 3, 2023 and filed on February 7, 2023 together with submissions dated February 6, 2023 and filed on February 7, 2023, we note that the respondents contend inter alia that if the applicant found the two decisions of the court not to be legally sound, it should have appealed rather than sought to review the same; that contrary to its allegation, by the time the applicant elected to seek review, it had understood the import and purport of the two judgments; that the issues raised in the two Judgments are straightforward and not complex. Further, that the period between delivery of the judgments in the two related appeals in late 2018, filing and serving the notice of appeal on May 20, 2022 to January 2023 is too inordinate and has not been adequately explained; that no official of the applicant has sworn an affidavit to explain the delay and the allegation of the applicant's internal approval protocols; and that it is mischievous for the applicant in the draft application for certification to seek to appeal both against the ruling delivered on April 28, 2022 and against the Judgment delivered on December 21, 2018 as an alternative prayer.
5. The respondents further contend that the mere existence of conflicting judgments does not qualify a matter to be of general public importance; filing of documents in the Court of Appeal are done online and nothing stopped the applicant from filing its notice of appeal on the e-filing portal within the prescribed time. Further, the respondents point out that the decretal sum of Kshs 6,942,616.70 deposited in a joint interest-earning account pending determination of the applicant's application for review, by a letter dated August 2, 2022, the parties agreed to have it released to the respondents, which means the judgment of the Court of Appeal has been fully executed rendering the intended appeal a mere academic exercise. Further, that whether or not an appeal is arguable is not one of the principles which a court must consider when dealing with an application for extension of time; and that the judgment of the Court of Appeal having been executed the applicant will not suffer any loss as it has paid the decretal sum save for costs.

We now pronounce as follows, bearing in mind all these submissions:

6. Appreciating that the court, under rule 15(2) of the *Supreme Court Rules, 2020* has unfettered discretionary powers to extend the time limited by the rules or by any of its decisions; that any person intending to appeal to the court is required by rule 36(1) of the *Supreme Court Rules, 2020*, to file a notice of appeal within fourteen days from the date of the decision intended to be challenged;
7. Restating the guiding principles in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* SC Application No 16 of 2014; [2014] eKLR enunciated as follows:
  1. 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;
  2. A party who seeks for 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. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;



5. Whether there will be any prejudice suffered by the respondents if the 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.
8. Further restating the principles in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* SC Civil Application No 3 of 2016; [2017] eKLR where we emphasized the need for the applicant, in an application for extension of time, to satisfactorily declare and explain the whole period of delay to the court; as well as the case *Base Titanium Limited v County Government of Mombasa & another* SC Petition (App) No 22 of 2018 [2019] eKLR, was echoed in *GEO Chem Middle East v Kenya Bureau of Standards* [2020] eKLR where we held that the principles for grant of an order of extension of time are that an applicant must give sufficient reasons for any delay and that the period of delay is nonetheless an important consideration in the court's exercise of discretion to grant or deny the extension.
  9. Noting that in spite of the respondents' contentions, the initial delay of five days in filing the notice of appeal is not inordinate and has been sufficiently explained by counsel. Be that as it may, the delay that concerns us is from service of the notice of appeal on May 20, 2022 to January 18, 2023 when the applicant elected to pursue an appeal before the Supreme Court, and in noting the error filed the instant application; a period of over seven (7) months. Though the *Supreme Court Rules, 2020* do not prescribe a timeline within which a party must seek certification, a period of over seven(7) months without explanation cannot be termed as reasonable. Rule 38 of the *Supreme Court Rules, 2020* requires the institution of an appeal within thirty (30) days from either the date of filing the notice of appeal or after the grant of certification, demonstrating the need to move with speed in pursuing an appeal before this court.
  10. Further noting that the applicant asks the court to apply the decision in *Seventh Day Adventist Church East Africa Ltd & 2 others v Masosa Construction Company* [2006] eKLR to find that the applicant, being a state corporation, had to follow its internal protocols before arriving at the decision to pursue an appeal and delays in making such decisions would be inevitable; that this was coupled with the time taken to understand and appreciate the effect of the two Judgments of the Court of Appeal;
  11. Bearing in mind that the respondents were served on May 20, 2022, they have been aware all along of the applicant's intention to appeal. We however, also take note that by a letter dated August 2, 2022, the parties agreed to have the sum of Kshs 6,942,616.70 deposited in a joint interest-earning account pending determination of the applicant's application for review, released to the respondents in fulfilment of the Judgment of the Court of Appeal.
  12. Considering that extension of time is an equitable remedy, the grant of which involves the exercise of judicial discretion and that equity aids the vigilant and not the indolent, we have great difficulty reconciling a party that lodges its notice of appeal on May 17, 2022, on August 2, 2022 releases funds to its opponents in fulfilment of the Judgment of the Court of Appeal yet waits another five (5) months before arriving at a decision to pursue an appeal to this court by way of certification. Reiterating our finding in *Hassan Nyanje Charo v Khatib Mwashetani & 3 others*; SC Application 15 of 2014[2014] eKLR the concept of timelines and timeliness is a vital ingredient in the quest for efficient and effective governance under the *Constitution* which must be adhered to.



13. For the aforesaid reasons we find that the applicant's explanation in the circumstances is neither reasonable nor satisfactory and great prejudice will be occasioned to the respondents if the application was to be allowed.
14. Accordingly, we are persuaded that in the circumstances, the instant application lacks merit and hereby make the following orders:
  - a. The notice of motion dated January 20, 2023 and filed on January 26, 2023 seeking to extend time within which to file a notice of appeal be and is hereby dismissed.
  - b. The applicant to bear the costs of the application.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF APRIL 2023.**

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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**

.....

**NJOKI NDUNGU**

**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**

Representation

Mr. Ngethe holding brief for Mr. Millimo for the Applicant

*(Millimo, Muthomi & Co. Advocates)*

Mr. Konosi for the 1st to 17th Respondents

*(Konosi & Co. Advocates)*

