



Senate & 3 others v Speaker of the National Assembly & 10 others (Petition (Application) 19 (E027) of 2021) [2023] KESC 95 (KLR) (10 November 2023) (Ruling)

Neutral citation: [2023] KESC 95 (KLR)

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

PETITION (APPLICATION) 19 (E027) OF 2021

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

NOVEMBER 10, 2023

BETWEEN

**THE SENATE 1ST APPELLANT
THE SPEAKER OF SENATE 2ND APPELLANT
SENATE MAJORITY LEADER 3RD APPELLANT
SENATE MINORITY LEADER 4TH APPELLANT**

AND

**THE SPEAKER OF THE NATIONAL ASSEMBLY 1ST RESPONDENT
THE NATIONAL ASSEMBLY 2ND RESPONDENT
THE COUNCIL OF COUNTY GOVERNORS 3RD RESPONDENT
THE ATTORNEY GENERAL 4TH RESPONDENT
INSTITUTE FOR SOCIAL ACCOUNTABILITY 5TH RESPONDENT
KENYA MEDICAL SUPPLIES AUTHORITY 6TH RESPONDENT
MISSION FOR ESSENTIAL DRUGS AND SUPPLIES 7TH RESPONDENT
KATIBA INSTITUTE 8TH RESPONDENT
PHARMACEUTICAL SOCIETY OF KENYA 9TH RESPONDENT
ELIAS MURUNDU 10TH RESPONDENT
THE COMMISSION ON REVENUE ALLOCATION 11TH RESPONDENT**

(Being an application for extension and enlargement of time for parties to conclude out-of-court discussions aimed at recording a consent on the Appeal and Cross-Appeal)



filed against the Judgment and Order of the Court of Appeal (Murgor, Nyamweya & Lesiit, JJ. A) delivered on 19th November 2021 in Civil Appeal No. E084 of 2021)

Jurisdiction to extend the time limited by either the Supreme Court Rules or by a decision of the court

The application sought for orders that the court enlarge and extend time for parties to conclude the ongoing out of court discussions. The court noted that by the provisions of rule 15(5) of the Supreme Court Rules, 2020, the court had jurisdiction to extend the time limited by either the Rules or by a decision of the court. The court found that the applicant had satisfied the strictures under rule 15(2) of the Supreme Court Rules, 2020, together with the principles to warrant the granting of leave to extend time within which to conclude the negotiations.

Reported by Kakai Toili

Jurisdiction – jurisdiction of the Supreme Court – jurisdiction to extend time for parties to conclude the ongoing out of court discussions - whether the Supreme court had the jurisdiction to extend the time limited by either the Supreme Court Rules or by a decision of the court - of Kenya, 2010, article 159(2)(c); , rule 15(5).

Brief facts

On July 11, 2023, when the matter was mentioned before the full court, parties indicated that they were engaged in out of court negotiations with the aim of settling the dispute. Consequently, the court issued directions which were subsequently amended on July 18, 2023, granting the parties up to September 11, 2023 to complete the ongoing negotiations. On September 7, 2023, a few days before the lapse of the period granted to the parties to try and reach a settlement, the Attorney General (4th respondent) filed the instant application for orders for the court to enlarge and extend time for parties to conclude the ongoing out of court discussions aimed at recording a consent on the appeal and the cross-appeal by at least 120 days.

Issues

Whether the Supreme Court had the jurisdiction to extend the time limited by either the Supreme Court Rules or by a decision of the court.

Relevant provisions of the Law

Section 29C

1. *In the conduct of proceedings, the Court shall promote and encourage alternative dispute resolution mechanisms, in accordance with article 159 (2) (c) of the Constitution.*

Held

1. Article 159(2)(c) of the of Kenya, 2010 (the Constitution) enjoined courts in the exercise of their authority, to promote alternative forms of dispute resolution in the administration of justice. In line with its framework, Social Transformation through Access to Justice (STAJ), the Judiciary had set out structures to actualize that imperative as one of the multi-door avenues for addressing case backlog while in the same vein making justice more accessible. The court by the provisions of rule 15(5) of the, had jurisdiction to extend the time limited by either the or by a decision of the court.
2. The instant motion was filed on September 7, 2023, before the lapse of the date set by the court's amended directions issued on July 18, 2023. There had not been any undue delay in filing the instant application as it was filed four days prior to the deadline of September 11, 2023.
3. Whereas the appellants had opposed the application for the reason that the applicant had not provided proof of any ongoing negotiations, when the appeal was mentioned before the full court on July 11, 2023, the appellants through their counsel confirmed that indeed a technical team comprising representatives from both Houses of Parliament were engaged in negotiations. The reasons for the delay of settling the matter out of court had been sufficiently explained and were plausible.
4. There were efforts by the parties towards reaching a settlement in the dispute and seeing the significant progress so far made in terms of the two Bills governing the processing of bicameral matters



- in Parliament, with one having passed through the first reading. The court was guided in steering the dispute towards a possible settlement by the provisions of section 29C(1) of the .
5. Article 159(2)(c) of the was an important pillar of the . The was a living document in which life should constantly be breathed into. The provisions of the were not mute but should be nourished and sustained by the courts among other entities. Consequently, the need to encourage ADR in dispute resolution could not be gainsaid. That burden rested on all persons and Government entities by virtue of article 2(1) of the which provided that the bound all.
 6. Co-operation among various State functionaries was key. Article 189 of the provided for cooperation between the two levels of Governments: national and county Governments. That in case of a dispute between the two levels of Government, every effort to settle the dispute under the national law should be pursued. Hence the court would not allow such a requirement of the to be abdicated.
 7. The applicant had satisfied the strictures under rule 15(2) of the, together with the principles to warrant the granting of leave to extend time within which to conclude the negotiations.

Application partly allowed.

Orders

- i. *The applicant's notice of motion dated September 7, 2023 was allowed to the extent that parties were granted, from the date of the ruling, a final one hundred and twenty(120) days extension to complete out of court negotiations and record a consent to compromise the appeal.*
- ii. *In the event that parties reach a settlement they shall file the written terms of the settlement before the court on or before the expiration of the one hundred and twenty (120) days aforesaid.*
- iii. *In any case the appeal shall be mentioned before the Deputy Registrar on March 15, 2024 to confirm the status.*
- iv. *Should the parties fail to reach a settlement, the matter shall be set down for hearing on a priority basis.*
- v. *Costs of the application shall abide the outcome of negotiations.*

Citations

Cases

1. Council of Governors v Attorney General & 7 others (Reference 2 of 2017; [2019] eKLR) — Explained
2. Rai & 3 other v Rai & 4 others (SC Petition No 4 of 2012; [2014] eKLR) — Explained
3. Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014; [2014] KESC 12 (KLR)) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 2(1), 109, 110, 159(2)(c); Chapter 8 — Interpreted
2. Supreme Court Act, 2011 (Act No 7 of 2011) — section 3, 3A, 29C(1) — Interpreted
3. Supreme Court Rules, 2020 (Act No 7 of 2011 sub leg) — rule 3(2), 15(2), 31(6) — Interpreted

Advocates

Mr. Okong'o Omogeni SC, Mr. Letangule and Ms. Mercy Thanji

RULING

Representation:

Mr. Okong'o Omogeni SC, Mr. Letangule and Ms. Mercy Thanji for the appellants (Letangule & Co. Advocates)

Mr. Paul Muite SC and Mr. Issa Mansur for the 1st and 2nd respondents (Issa & Company Advocates)

Mr. Emmanuel Bitta for the 4th respondent (the applicant (Office of the Attorney General))



Non-appearance by the 3rd, 5th, 6th, 7th, 8th, 9th, 10th and 11th Respondents

1. Cognizant that article 159(2)(c) of the Constitution enjoins courts in the exercise of their authority, to promote alternative forms of dispute resolution in the administration of justice. In line with its framework, Social Transformation through Access to Justice (STAJ), the Judiciary has set out structures to actualize this imperative as one of the multi-door avenues for addressing case backlog while in the same vein making justice more accessible; and
2. Recalling that, on July 11, 2023 when this matter was mentioned before the full court, parties indicated that they were engaged in out of court negotiations with the aim of settling the dispute. Consequently, upon considering the nature of the dispute and the benefits of a resolution arrived through consensus, the court issued directions, which were subsequently amended on July 18, 2023, granting the parties up to September 11, 2023 to complete the ongoing negotiations; directing the parties in the event they reach an amicable settlement, to file the written terms of the settlement in the court on or before September 11, 2023; and should there be no settlement by the aforesaid date, the matter would be set down for hearing on priority basis considering the period this appeal has been pending before the court; and
3. Noting that on September 7, 2023, a few days before the lapse of the period granted to the parties to try and reach a settlement, the Attorney General (4th respondent) filed the instant application pursuant to articles 50 and 159 of the Constitution, sections 3 and 3A of the Supreme Court Act, 2011 as well as rules 3(2), 15(2) and 31(6) of the Supreme Court Rules, 2020 for orders that:
 - “i) Spent...
 - ii. This honourable court be pleased to enlarge and extend time for parties to conclude the ongoing out of court discussions aimed at recording a consent on the Appeal and the cross-appeal by at least 120 days.
 - iii. The parties be at liberty to move the court for any further orders.
 - iv. The costs of this Application be in the cause.”; and
4. Upon considering the grounds of the application and supporting affidavit sworn on September 7, 2023 by Shadrack J. Mose, the Solicitor General, to the effect that; the Office of the Prime Cabinet Secretary is currently involved in facilitating negotiations between the Houses of Parliament aimed at coming up with a legislative framework to guide bicameral relations between the National Assembly and the Senate, pursuant to which a meeting chaired by the Prime Cabinet Secretary was held on July 4, 2023 involving the Hon. Attorney General and the Leadership of the Majority Party in the Houses of Parliament; at the meeting, teams from both Houses agreed to propose and submit to the Attorney General for harmonization draft Bills governing the processing of bicameral matters in Parliament; subsequently, two draft Bills have been accordingly submitted being, the Houses of Parliament (Bicameral Relations) Bill, 2023 by the National Assembly and the Determination of the Nature of a Bill (Procedure) Bill 2023, by the Senate; and that the hon. Attorney General requires more time to harmonize the draft Bills before they can be published and introduced to the Houses of Parliament for consideration in accordance with the Constitution and the respective Standing Orders of the Houses of Parliament; and
5. Furthermore, the National Assembly House Business Committee has adopted and published the Houses of Business (Bicameral Relations) Bill 2023 under the name of the Hon. Samuel Chepkonga M.P who is a member of the committee; the Bill seeks to give further effect to the procedures relating to matters of a bicameral nature between the Houses of Parliament including actualizing the provisions



- of article 109 and 110 of the Constitution; that this Bill, once enacted and assented to by the President, shall settle this appeal and also obviate any future conflicts between the Houses of Parliament; that it is in public interest that both Houses be allowed more time to complete the ongoing negotiations; and that the court be pleased to exercise its discretionary power to extend the time for conclusion of the ongoing negotiations by at least 120 days; and
6. Considering the applicant's submissions dated September 11, 2023 wherein it is emphasized that the Attorney General and both Houses of Parliament are genuinely committed to the resolution of the issues before us; that chapter 8 of the Constitution encourages and recognizes negotiated and mediated settlement of disputes between both Houses of Parliament and allows Parliament to set its own procedures; that the proposed settlement of the dispute through enactment of a statute or statutes will provide a long-lasting solution in a manner that allows for public participation; and that the applicant has satisfied the principles for extension of time as set out by this court in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others, SC Application No. 16 of 2014; [2014] eKLR; and
 7. Upon considering the 1st and 2nd respondents' replying affidavit sworn on September 8, 2023 by Mr. Samuel Njoroge, the Clerk of the National Assembly, and the submissions filed on their behalf dated October 4, 2023 in support of the application where it is explained that the leadership of the two Houses of the 13th Parliament have expressed the desire, where possible, to resolve any disputes between the Houses amicably without resorting to judicial proceedings; that pursuant to this desire, on February 16, 2023, the Speakers of both Houses convened a meeting of the leadership of both Houses to discuss and consider the modalities of improving the bicameral relations between both Houses and to resolve and settle all pending court matters and disputes between them; subsequently, the Clerks of the Houses constituted a joint technical team to consider the jurisdictional difficulty in the legislative process and propose a framework for the seamless operation of the said process and recording of a final consent for the settlement of this matter; that on June 23, 2023 the joint technical team established a joint drafting team to develop the jointly agreed framework; and that on July 4, 2023 the leadership of the Majority in both Houses held a meeting with the Prime Cabinet Secretary and the Attorney General where it was resolved that each House would finalize and submit to the latter, draft Bills governing the processing of Bills under articles 109 and 110 of the Constitution and other bicameral matters for harmonization; and
 8. Consequently, on August 10, 2023, the 2nd respondent submitted to the Prime Cabinet Secretary the draft Houses of Parliament (Bicameral Relations) Bill, 2023 which was then approved by the National Assembly's House Business Committee while the appellants submitted the Determination of the Nature of a Bill (Procedure) Bill, 2023; that on August 17, 2023 the draft Houses of Parliament (Bicameral Relations) Bill, 2023 underwent the first reading and was subsequently committed to the Departmental Committee on Justice and Legal Affairs to facilitate public participation; that on September 4, 2023, the Prime Cabinet Secretary forwarded the draft Bills to the Attorney General for harmonization; that as a result, parties have not been able to record a consent as directed by the court; that further delay in this regard was occasioned by the fact that the National Assembly proceeded on recess from August 24, 2023 to September 25, 2023 and the Bill was scheduled to be tabled before Parliament upon resumption of the National Assembly. Therefore, it is in the public interest that Parliament and the Attorney General be granted sufficient time to complete the ongoing negotiations; and that the parties will suffer no prejudice if this application is allowed; and
 9. Taking into account the 1st to 4th appellants' grounds of opposition to the application and submissions filed on their behalf dated October 2, 2023 to the effect that; the application is bad in law and an abuse of the court process; the applicant has not attached any evidence to the application to demonstrate that



the negotiations are ongoing; that the application is an afterthought aimed at frustrating the appellants in their attempt to pursue justice; and finally that the application is an attempt to delay hearing and determination of the matter; and having considered the application, affidavits and rival arguments by the parties, we now opine as follows:

10. Aware that this matter was certified as ready for hearing, but for the efforts of the parties to attempt an out of court settlement; that on July 11, 2023 at the request of the parties, it was taken out to give them a chance towards this end and to record a consent on or before September 11, 2023. However, four days before the lapse of the period granted, the applicant has instituted the instant application praying that time for lodging a consent compromising the appeal be enlarged.
11. Whereas this court by the provisions of rule 15(5) of the Supreme Court Rules, 2020, has jurisdiction to extend the time limited by either the Rules or by a decision of the court and guided by the principles well enunciated in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others, SC Application No 16 of 2014; [2014] eKLR; and
12. Taking into account that this motion was filed on September 7, 2023, before the lapse of the date set by our amended directions issued on July 18, 2023, we are persuaded that there has not been any undue delay in filing the instant application as it was filed four days prior to the deadline of September 11, 2023.
13. Whereas the appellants have opposed this application for the reason that the applicant has not provided proof of any ongoing negotiations, we recall and it is apparent on the face of the record that when the appeal was mentioned before the full court on July 11, 2023, the appellants through their counsel Mr Okongo Omogeni, SC appearing together with Mr Letangule, Ms Thanji and Ms. Nduta, confirmed that indeed a technical team comprising representatives from both Houses were engaged in negotiations.
14. Satisfied ourselves on the strength of the correspondence from the Office of the Prime Cabinet Secretary and several letters exchanged between the Offices of the Clerks of both Houses and the Office of the Prime Cabinet Secretary, resolutions from the various meetings and a copy of the draft Houses of Parliament (Bicameral Relations) Bill, 2023 by the National Assembly, all which are annexed to the applicant's Affidavit in support of the application; that consultative meetings involving the leadership and technical teams from both Houses have been ongoing with the aim of developing proposals on the processing of Bills. Further, the 1st and 2nd respondents have in their replying affidavit detailed the series of events that have occurred since February 2023 to date, all in an effort to settle the dispute pending before the court. Then, finally, there was the August/September break for both Houses. Consequently, we find and come to the conclusion that the reasons for the delay of settling the matter out of court have been sufficiently explained and are plausible.
15. Evidently, there are efforts by the parties towards reaching a settlement in this dispute and seeing the significant progress so far made as deposed in the Affidavit evidence of Shadrack J. Mose and Samuel Njoroge, in terms of the two Bills, with one having passed through the first reading. And in addition, we continue to be guided in steering this dispute towards a possible settlement by the provisions of section 29C (1) of the Supreme Court Act that provides that;

“In the conduct of proceedings, the court shall promote and encourage alternative dispute resolution mechanisms, in accordance with article 159 (2) (c) of the Constitution.”



16. Further, in line with the court’s decision in *Council of Governors v Attorney General & 7 others*, Reference 2 of 2017; [2019] eKLR we reiterate the statement in the following passage:

“(64) We reiterate that article 159(2)(c) is an important pillar of the *Constitution*. It is trite law that the *Constitution* is a living document in which life should constantly be breathed into. The provisions of the *Constitution* are not mute but should be nourished and sustained by our courts among other entities. Consequently, the need to encourage ADR in dispute resolution cannot be gainsaid. This burden rests on all persons and government entities by virtue of article 2(1) of the *Constitution* which provides that the *Constitution* binds all.

...

(67) Secondly, co-operation among various state functionaries is key. Article 189 of the *Constitution* provides for cooperation between the two levels of governments: national and county governments. That in case of a dispute between the two levels of government, every effort to settle the dispute under the national law should be pursued. Hence this court would not allow such a requirement of the *Constitution* to be abdicated.” [our emphasis]

17. Guided accordingly by the foregoing, we find that the applicant has satisfied the strictures under rule 15(2) together with the principles under *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (*supra*) to warrant the granting of leave to extend time within which to conclude the negotiations.

18. Consequently, we are minded to grant the parties a final opportunity of 120 days from the date of this ruling considering the averment by the 1st and 2nd respondents that Parliament will again be proceeding on recess during part of this period.

19. On costs, the award of the same is discretionary and follows the principle set out by this court in *Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR that costs follow the event. In exercise of our discretion, we defer the costs of this application which shall abide the outcome of the negotiations.

20. Accordingly, we make the following orders:

- i The applicant’s notice of motion dated September 7, 2023 be and is hereby allowed to the extent that parties are granted, from the date of this ruling, a final one hundred and twenty(120) days extension to complete out of court negotiations and record a consent to compromise this appeal.
- ii. In the event that parties reach a settlement they shall file the written terms of the settlement before this court on or before the expiration of the one hundred and twenty (120) days aforesaid.
- iii. In any case the appeal shall be mentioned before the hon Deputy Registrar on March 15, 2024 to confirm the status.
- iv. Should the parties fail to reach a settlement, the matter shall be set down for hearing on a priority basis.
- v. Costs of this application shall abide the outcome of negotiations.

It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER 2023.

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M.K. KOOME
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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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

.....

S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

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I. LENAOLA
JUSTICE OF THE SUPREME COURT

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W. OUKO
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA

