



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimani & 2 others v Attorney General (Petition  
34 of 2019) [2022] KESC 12 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KESC 12 (KLR)

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

**PETITION 34 OF 2019**

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

**MAY 19, 2022**

**BETWEEN**

**PRISCILLA MWARA KIMANI ..... 1<sup>ST</sup> APPLICANT**

**LUCY WATURI KIMANI ..... 2<sup>ND</sup> APPLICANT**

**ESTHER GATHONI GICIMU ..... 3<sup>RD</sup> APPLICANT**

**AND**

**ATTORNEY GENERAL ..... RESPONDENT**

*(Being an application for leave to file a Supplementary Record of Appeal and consolidation of Petition No. 34 of 2019 with Petition Nos. 26 and 35 of 2019)*

**A delay of nine days cannot be termed as inordinate in an application seeking leave to file a supplementary record of appeal**

Reported by Kakai Toili

*Civil Practice and Procedure – appeals - record of appeal - supplementary record of appeal - timelines for filing a supplementary record of appeal at the Supreme Court - whether a delay of nine days could be termed as inordinate in an application seeking leave to file a supplementary record of appeal.*

*Civil Practice and Procedure – suits – consolidation of suits - what were the factors to consider in determining whether to consolidate suits?*

**Brief facts**

The applicants filed the instant application seeking leave of the court to file a supplementary record of appeal in order to include a certified copy of the order of dismissal of their appeal at the Court of Appeal; consolidation of their appeal, being Petition No. 34 of 2019 with Petition No. 26 of 2019 and Petition No. 35 of 2019 and designation of Petition No. 26 of 2019 as the lead file.

It was the applicant's case that notwithstanding the order of dismissal being issued on December 16, 2021, a certified copy of the order was served upon the advocate on January 21, 2022. Further, that the three appeals



sought to be consolidated were not only founded on alleged violation of constitutional rights that occurred at ‘Freedom Corner’ and All Saints Cathedral Church between March 3, 1992 and January 19, 1993 but were also decided by the same judge in the High Court and Bench of the Court of Appeal and raised similar issues.

### Issues

- i. Whether a delay of nine days could be termed as inordinate in an application seeking leave to file a supplementary record of appeal.
- ii. What were the factors to consider in determining whether suits should be consolidated?

### Held

1. In line with the principles set out by the court in *Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission & 7 Others*, SC Application No. 16 of 2014; [2014] eKLR, the applicants had provided a plausible and reasonable explanation for the omission of the certified order in question and the delay in filing the supplementary record of appeal.
2. Taking into account that the certified order was served upon the applicants’ advocates on January 21, 2022 and that the motion at hand was filed on February 1, 2022, about nine days thereafter, the delay could not be termed as inordinate. Equally, the certified order sought to be introduced through the supplementary record of appeal was not prejudicial to the respondent.
3. Petition Nos. 26, 34 and 35 of 2019 before the court arose from the same set of circumstances, raised similar issues and sought similar orders. Further, they met the threshold for consolidation.

*Application allowed; costs of the application to abide by the outcome of the consolidated appeal.*

### Orders

- i. *The applicants were granted leave to file a supplementary record of appeal to include a certified copy of the order of dismissal issued on December 16, 2021 by the Court of Appeal within seven days of the ruling.*
- ii. *Petition No. 34 of 2019, Priscilla Mwara Kimani & 2 Others v Attorney General was consolidated with Petition No. 26 of 2019, Monica Wangu Wamwere v Attorney General, and Petition No. 35 of 2019, Michael Maina Kamami & Another v Attorney General. Petition No. 26 of 2019 being the first in time would be the lead file.*

### Citations

#### Cases

1. *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* (Petition 14 of 2013; [2014] eKLR) — Explained
2. *Nicholas Kiptoo arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others* (SC Application No 16 of 2014; [2014] eKLR) — Explained
3. *Omoke v Kenyatta & 83 others* (Petition 11 of 2021; [2021] KESC 27 (KLR)) — Explained

#### Statutes

1. *Supreme Court Rules, 2011* (No 7 of 2011 Sub-Leg) — Rule 15(2) — Interpreted
2. *Supreme Court Rules, 2012* (repealed) — Rule 23 — Interpreted

#### Advocates

*Mr. James H. Gitau Mwara* for the Applicants

## RULING

1. Upon perusing the notice of motion dated January 21, 2022 and filed on 1st February, 2022 which is erroneously premised on rule 23 of the *Supreme Court Rules, 2012 (Repealed)* and other enabling provisions of the law; the applicants seek leave of the court to file a supplementary record of appeal in order to include a certified copy of the order of dismissal of their appeal at the Court of Appeal;



consolidation of their appeal, being Petition No 34 of 2019 with Petition No 26 of 2019 and Petition No 35 of 2019 and designation of Petition No 26 of 2019 as the lead file.

2. Upon considering the affidavit by Mr James H Gitau Mwaru, learned counsel appearing for the applicants, sworn in support of the motion and the applicants' submissions to the effect that, following the dismissal of their appeal at the Court of Appeal on 6th August, 2019; they filed their petition and record of appeal before this court on 19th August, 2019 and August 27, 2019 respectively; that at the time of filing their appeal, the settling of terms of the order of dismissal had initially been scheduled for 18th February, 2020 but was eventually settled on December 14, 2021; that notwithstanding, the order of dismissal being issued on 16th December, 2021, a certified copy of the order was served upon the advocate on January 21, 2022 as evidenced by a copy of an email from the Deputy Registrar of the Court of Appeal annexed to the motion. Further, that the three appeals sought to be consolidated are not only founded on alleged violation of constitutional rights that occurred at 'Freedom Corner' and All Saints Cathedral Church between March 3, 1992 and January 19, 1993 but were also decided by the same Judge in the High Court (Lenaola, J, as he then was) and Bench of the Court of Appeal (Warsame, Kiage & Murgor, JJA); and raise similar issues.
3. Noting that the respondent did not file any response despite service of the motion.
4. We find as follows:
  - a. In line with the principles set out by this Court in *Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, SC Application No 16 of 2014; [2014] eKLR, the applicants have provided a plausible and reasonable explanation for the omission of the certified order in question and the delay in filing the supplementary record of appeal. Further, taking into account that the certified order was served upon the applicants' advocates on January 21, 2022 and the motion at hand was filed on February 1, 2022, about nine days thereafter, the delay cannot be termed as inordinate. Equally, we note that the certified order sought to be introduced through the supplementary record of appeal is not prejudicial to the respondent. Therefore, we are inclined to exercise our discretion under rule 15(2) of the *Supreme Court Rules, 2020* in favour of the applicants.
  - b. Petition Nos 26, 34 and 35 of 2019 before this court arise from the same set of circumstances, raise similar issues and seek similar orders. Further, they meet the threshold for consolidation as delineated in *Omoke v Kenyatta & 83 others*, Petition 11 of 2021; [2021] KESC 27 (KLR) and *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others*, SC Petition No 14 of 2013; [2014] eKLR.
5. Consequently, we allow the notice of motion dated January 21, 2022 and make the following orders: -
  - i. The applicants are hereby granted leave to file a supplementary record of appeal to include a certified copy of the order of dismissal issued on December 16, 2021 by the Court of Appeal within seven days of this ruling.
  - ii. Petition No 34 of 2019, *Priscilla Mwaru Kimani & 2 others v Attorney General* is hereby consolidated with Petition No 26 of 2019, *Monica Wangu Wamwere v Attorney General*, and Petition No 35 of 2019, *Michael Maina Kamami & another v Attorney General*. Petition No 26 of 2019 being the first in time shall be the lead file.
  - iii. The costs of the application shall abide by the outcome of the consolidated appeal.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2022.**

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**M.K. KOOME**

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**CHIEF JUSTICE & PRESIDENT  
OF THE SUPREME COURT OF KENYA**

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**P. M. MWILU  
DEPUTY CHIEF JUSTICE & VICE  
PRESIDENT OF THE SUPREME COURT OF KENYA**

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**S. C WANJALA  
JUSTICE OF THE SUPREME COURT**

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**NJOKI NDUNGU  
JUSTICE OF THE SUPREME COURT**

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**W. OUKO  
JUSTICE OF THE SUPREME COURT**

