



Itolondo v Attorney General & 9 others (Application 3 (E005) of 2021) [2021] KESC 44 (KLR) (16 July 2021) (Ruling)

Wilfrida Arnodah Itolondo v Attorney General & 9 others [2021] eKLR

Neutral citation: [2021] KESC 44 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
APPLICATION 3 (E005) OF 2021**

PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ

JULY 16, 2021

BETWEEN

WILFRIDA ARNODAH ITOLONDO APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

CABINET SECRETARY, MINISTRY OF EDUCATION 2ND RESPONDENT

TECHNICAL UNIVERSITY OF KENYA COUNCIL 3RD RESPONDENT

JARAMOGI OGINGA ODINGA UNIVERSITY COUNCIL ... 4TH RESPONDENT

UNIVERSITY OF KABIANGA COUNCIL 5TH RESPONDENT

MAASAI MARA UNIVERSITY COUNCIL 6TH RESPONDENT

FRANCIS ADUOL 7TH RESPONDENT

STEPHEN AGONG 8TH RESPONDENT

WILSON KIPNG'ENO 9TH RESPONDENT

MARY WALINGO 10TH RESPONDENT

(Being an application for stay of execution and extension of time to lodge a Notice of Appeal against the judgment of the Court of Appeal at Nairobi (Koome, Musinga & Murgor, JJ. A) delivered on 20th November 2020 in Civil Appeal No. 120 of 2019)

Effect of filing an appeal out of time and without leave of the court

The applicant sought for an extension of time to lodge a notice of appeal against the judgment of the Court of Appeal and for stay of execution of the order on costs therein. The court highlighted the effect of filing an appeal out of time and without leave of the court.



Reported by Chelimo Eunice

Civil Practice & Procedure – appeals – appeals to the Supreme Court - timelines for filing appeals to the Supreme Court – what was the timeframe within which to file a notice of appeal at the Supreme Court – timelines within which to transmit the filed notice of appeal to the Registrar of the Supreme Court and to serve the transmitted copies upon all persons affected by the appeal – claim alleging that the delay in filing the notice of appeal was caused by failure by the Court of Appeal Registry to lodge the notice on time – what was the effect of filing a petition of appeal out of time and without leave of the court - what were the guiding principles on extension of time – requirement on the applicant to explain the reasons for delay in making the application for extension of time - Supreme Court Rules, 2020, rules 15(2), 36(1) and 38(1).

Brief facts

The applicant sought for an extension of time to lodge a notice of appeal against the judgment of the Court of Appeal and for stay of execution of the order on costs therein. The applicant posited that the Court of Appeal Registry delayed in lodging her notice of appeal and subsequently, lodging and backdating it at her disadvantage. She also blamed the Covid-19 pandemic which saw the Court of Appeal limit in-person visits at its offices and encouraged online modes of communication.

The respondents opposed the application with arguments that included that there was no evidence that the applicant followed up on the lodging of the notice of appeal. They also argued that the notice of appeal did not disclose the specific article of the Constitution the intended appeal was anchored on and that the application was premised on the Civil Procedure Rules, 2010 as opposed to the Supreme Court Rules rendering the application bad in law and an abuse of the court process.

Issues

- i. What was the timeline within which to lodge an appeal at the Supreme Court?
- ii. What was the effect of filing a petition of appeal out of time and without leave of the court?
- iii. What were the principles to be considered in exercise of discretion to extend time for filing appeals?

Held

1. Rule 15(2) of the Supreme Court Rules, 2020 (the Rules) granted the Supreme Court the discretion to extend the time limited by the Rules or any decision of the court.
2. Under rule 36(1) of the Rules, a notice of appeal ought to be filed within 14 days from the date of judgment or ruling which was subject of appeal. It was the responsibility of the appellant to transmit a copy of the notice of appeal to the Registrar of the Supreme Court and serve, within 7 days, the transmitted copies of the notice upon all persons affected by the appeal.
3. According to rule 38(1) of the Rules, a petition to the Supreme Court had to be filed within 30 days of the date of filing the notice of appeal, where the appeal was as of right. In that regard, the applicant ought to have filed her petition of appeal and record of appeal by December 30, 2020.
4. The discretion to extend time was unfettered. It was incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there were any extenuating circumstances that could enable the court to exercise its discretion in favour of the applicant. The following were the underlying principles that a court ought to consider in exercising such discretion:
 - a. 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;
 - b. a party who sought extension of time had the burden of laying a basis, to the satisfaction of the court;
 - c. whether the court could exercise the discretion to extend time was a consideration to be made on a case- to- case basis;
 - d. where there was a reasonable cause for the delay, the same had to be expressed to the satisfaction of the court;
 - e. whether there would be any prejudice suffered by the respondents if extension was granted;



- f. whether the application had been brought without undue delay; and
 - g. whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.
5. Further, there was 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.
6. The judgment of the Court of Appeal was delivered on November 20, 2020. Consequently, the notice of appeal ought to have been filed and transmitted to the Supreme Court by December 4, 2020 being the fourteenth day from the date of judgment under rule 36 of the Rules. The applicant's notice of appeal was filed on December 1, 2020 and lodged on even date. That, therefore, implied that the notice of appeal was filed on time. However, the same was not transmitted to the Supreme Court within the laid down timelines.
7. Although the applicant attributed the delay to file the appeal and transmit the notice of appeal on time to the officer responsible for lodging documents at the Court of Appeal, she did not annex an affidavit from the said process server to enable the court to validate her justification for the delay. The applicant also failed to validate the delay in bringing the instant application from the date she realized that the time for instituting the appeal and forwarding the notice of appeal to the court had lapsed. Consequently, the applicant had failed to meet the criteria for extension of time.
8. The petition was null and void for being filed out of time and without leave hence, struck out. Therefore, in the absence of a substantive appeal on record, the court was unable to grant the orders of stay of execution of the order on costs as sought.
9. Ultimately, the application lacked merit and was dismissed. As the ruling effectively brought to an end the proceedings before the Supreme Court, the court did not see any need to extend the dispute to the limited question of costs.

Application dismissed. Petition No. E004 of 2021 filed electronically on February 11, 2021 struck out, with each party bearing its own costs.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

A. Introduction

1. The Notice of Motion before the Court is dated 17th February 2021 and filed on 23rd February 2021. It is brought under Articles 3, 22, 35, 47, 159, 162, 232 and 258 of the Constitution, Section 15(2) of the Supreme Court Act, Section 39 of the Universities Act, 2012 and Sections 1 and 24 of the Statutory Instruments Act seeking two substantive orders:
 - a. That time be extended for admitting a lodged Notice of Appeal dated 1st December 2020 against the decision of the Court of Appeal in Civil Appeal No. 120 of 2019.
 - b. That pending the hearing and determination of this application and/or the petition, the Honourable Court be pleased to stay the execution of the Order on costs in Civil Appeal No. 120 of 2019.



2. The application is anchored on several grounds on the face of the application, the supporting affidavit and supplementary affidavit of the applicant, Wilfrida Itolondo, sworn on 17th and 22nd February 2021, respectively.
3. On 2nd March 2021, when the matter came up for mention before the Deputy Registrar of this Court, there was no representation on the part of the 1st and 2nd respondents. All respondents were nonetheless directed to file and serve their responses and submissions within seven days. There is still no response filed by the 1st and 2nd respondents on the record.
4. In opposing the application, the 3rd and 7th respondents have filed: a replying affidavit sworn by Ruth Kirwa, the 3rd respondent's Legal Officer; a Notice of Preliminary Objection; and written submissions both dated 8th March 2021. On their part, the 4th and 8th respondents have filed a Notice of Preliminary Objection and written submissions both dated 8th March 2021 in opposition to the application. Equally opposing the application are the 5th and 9th respondents vide a replying affidavit sworn by the 9th respondent, Wilson Kipng'eno on 8th March 2021 and written submissions filed on even date. In opposing the application, the 6th and 10th respondents have filed a replying affidavit sworn by Mercylene Njoroge on 9th March 2021 and submissions on even date.

B. Background

5. This matter can be traced to the Employment and Labour Relations Court (ELRC) Petition No. 66 of 2018, wherein the applicant sought several declaratory and mandatory orders of injunction, to the effect that the respondents violated several Articles of the Constitution in the re-appointment of the Vice Chancellors (VCs) of four Public Universities namely; Technical University of Kenya, Jaramongi Oginga Odinga University, University of Kabinga and Maasai Mara University, the 3rd to 6th respondents, respectively. The applicant also sought the nullification of the re-appointment to office as VCs of the 3rd to 6th respondents on the ground that their appointment to office contravened the Constitution. She further sought a declaration that the provisions of Section 39 (3) of Universities Act, the respective Rules and Regulations contained in the Charter and the Governance Code of State Corporations (Mwongozo) be declared unconstitutional for failing to provide for a competitive re-appointment for the office of VC in public universities.
6. On 15th February 2019, the Court (M. Onyango J), identified one issue for determination, that is, whether the re-appointments of the 7th to the 10th respondents as VCs of the 3rd to the 6th universities violated Articles 2, 3, 10, 35, 232 and Section 7 of the 6th Schedule of the Constitution, and Section 39 (1) (a) of the Universities Act, 2012. In dismissing the petition, the Judge found that the 7th to the 10th respondents were eligible candidates for re-appointment as per the Universities Act; the issues had been determined by the Court of Appeal in Civil Appeal No. 120 of 2014 which was filed by the applicant; and the process of re-appointments as Vice Chancellors of the respective Universities was properly carried out by the Councils and therefore, did not contravene the Universities Act or statutes.
7. Aggrieved by the ELRC's finding, the applicant filed Civil Appeal No. 120 of 2019, Wilfrida Arnodah Itolondo v Attorney General & 9 others raising fifteen (15) grounds which were later summarized into four, namely: whether the learned trial Judge erred in law by holding that there was no proof of violation of Articles 3, 10, 27, 35, 73 and 232 of the Constitution by the 2nd respondent in the re-appointment of the 7th to 10th respondents in office as VCs; whether the re-appointment contravened the Universities Act, and or any other statutes; whether the court was bound by the Court of Appeal decision in Wilfrida Itolondo & 4 Others vs. President and 7 Others [2015] eKLR; and finally, whether the Judge erred by failing to pronounce herself as to whether the provisions of a Circular by the Permanent Secretary/Secretary to the Cabinet and Head of Civil Service dated 23rd November, 2010



was null and void for being inconsistent with the provisions of the Constitution and the Universities Act, on the procedure of appointment of VCs.

8. On 20th November 2020, the Court of Appeal dismissed the appeal in its entirety. The Court of Appeal in doing so upheld the finding of the trial that the appointment of the 6th to 10th respondents was legal. It also found the issue of re-appointment of VCs res judicata as it had been litigated by the applicant in *Wilfrida Itolondo & 4 Others vs. President and 7 Others*, CA Civil Appeal No. 120 of 2014 [2015] eKLR. The Court furthermore observed that it was not the intention of the Legislature to provide for a competitive process of re-appointment of VCs under the Universities Act and it thus left any amendments to the Universities Act to be done by the Legislature.

C. Parties' Respective Cases

i. The applicant's

9. The applicant submits that she filed, electronically, a Notice of Appeal on 1st December 2020, but it was not lodged immediately. It is her contention that despite numerous follow-ups, through a process server, the Notice was not lodged. Further, that the process server was told that the Officer-in-Charge of the Court of Appeal Civil Division Registry was absent. The applicant submits that it is not until 13th January 2021 that she personally made a follow-up, was asked to wait; the Notice of Appeal was printed, given to one of the staff at the Registry to take to the Deputy Registrar for lodging; then she was issued the lodged Notice of Appeal that was backdated to 1st December 2020 when it was filed electronically.
10. It is contended that despite complaining to the Deputy Registrar and the Registrar of the Court of Appeal, and of the Supreme Court, her concerns have not been addressed to date. She relies on her letter dated 14th January 2021 annexed to the application. Furthermore, the applicant submits that she filed before this Court Petition No. E004/2021 on 11th February 2021 being the last day from 13th January 2021, the date she received the lodged the Notice of Appeal.
11. To support her case for extension of time, the applicant submits that since the onset of Covid-19 pandemic in Kenya, the Court of Appeal has been communicating to litigants through email and that if at all the Notice of Appeal was lodged on 1st December 2020, she was never notified of the same. She also urges that the appeal is arguable as it concerns the application of the Constitution and Statutes, especially on the re-appointment of VCs of public universities. She urges that unless given an opportunity to ventilate her case before the Court, the decision of the superior courts below will be enforced at the detriment of the Constitution.
12. Furthermore, the applicant submits that there are contradicting rulings and practices with regards to the procedure of re-appointing VCs in public universities at the expiry of their first tenure, which the Court needs to settle. She challenges the Court of Appeal's decision to penalize her with costs arguing that the decision will discourage potential litigants who may want to move courts in the event of constitutional violations.
13. The applicant concludes her submissions by stating that the delay in filling the appeal can only be attributed to the Court of Appeal which delayed in lodging the Notice of Appeal and backdating the same to her disadvantage.

ii. The 3rd and 7th Respondents'

14. In their Preliminary Objection dated 8th March 2021, the 3rd and 7th respondents contend that this Court lacks jurisdiction to entertain the application because the Notice of Appeal does not disclose



the specific Article of the Constitution the intended appeal is anchored on, and that the application is defective for citing the Civil Procedure Rules, 2012 instead of the Supreme Court Rules, 2020.

15. The 3rd and 7th respondents submit that the issue for determination before the trial court revolves around the legality of the re-appointment of the 7th to 10th respondents; the interpretation of Section 39(1) and (3) of the Universities Act; and has nothing to do with the interpretation and application of the Constitution. They urge that the Court of Appeal dismissed the appeal on the ground of res judicata and further that at no point did the learned Judges take a trajectory of constitutional interpretation and application. In that context, they anchor their argument on this Court's decisions in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, S.C App. No. 5 of 2014; [2014] eKLR (Munya 1), and *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC. Pet. No. 3 of 2012; [2012] eKLR.
16. While citing Article 163(4) and (5) of the Constitution, the Supreme Court Act, the Supreme Court Rules and this Court's decisions in *Cordisons International (K) Limited v Chairman National Land Commission & 43 others*, Petition No. 14 of 2019; [2020] eKLR; *Sarah Anyangu Ochieng v Technical University of Kenya*, Civil Application No. 7 of 2018; [2019] eKLR (Sarah Anyangu Case); *Republic v Karisa Chengo & 2 others*, Petition No. 5 of 2015; [2017] eKLR; and *Peter Oduor Ngoge v Francis Ole Kaparo & others*, Petition No. 2 of 2012; [2012] eKLR, the 3rd and 7th respondents urge that the applicant has not invoked the relevant legal and constitutional provisions to move this Court in the present application.
17. It is also submitted that since the Notice of Appeal was filed on 1st December 2020, in the absence of an order extending time for filing an appeal out of time, SC Petition No. E004 of 2021 was filed out of time. They rely on this Court's decision in *County Executive of Kisumu v County Government of Kisumu & 8 others*, SC. Civil Appl. No. 3 of 2016; [2017] eKLR (County Executive of Kisumu Case) to support their argument.
18. Contradicting the applicant's argument that the Court of Appeal delayed in issuing her with a lodged Notice of Appeal, the 3rd and 7th Respondents submit that the applicant was duty bound to consistently follow up with the Registrar until the same was lodged. In that context, they contend that there is nothing before us to confirm that the applicant indeed constantly followed up on the lodging of the Notice of Appeal and that she was prevented from visiting the Registry or to meet with the relevant court officers.
19. Finally, the 3rd and 7th respondents urge that the substratum of Petition No. E004 of 2021 is the re-appointment of VCs in public universities, an issue the Court of Appeal noted has been previously litigated by the same applicant in Civil Appeal No. 120 of 2014 and that no constitutional issues were raised therein. Concerning costs awarded by the appellate court, they submit that award of costs is a discretionary power that can only be interfered with upon proof that the discretion was not judiciously exercised. Accordingly, they urge us to dismiss this application with costs.

iii. The 4th and 8th respondents'

20. In their Notice of Preliminary Objection dated 8th March 2021, the 4th and 8th respondents contend that this Court lacks jurisdiction to entertain the matter on the grounds that: the Notice of Appeal does not disclose the specific Article of the Constitution and the legal provisions upon which the Court is moved; the intended appeal is one that requires prior certification from the Court of Appeal; the applicant failed to comply with the provisions of Rules 36(3) and 38(1)(b) of the Supreme Court Rules; and the application is bad in law and an abuse of the court process.



21. Citing this Court's decision in the Matter of Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011; [2011] eKLR, and Sarah Anyangu Case, they urge that the applicant has not properly moved this Court as provided for under Article 163(4) and (5) of the Constitution and Section 19 of the Supreme Court Act.
22. The 4th and 8th respondents also submit that despite praying for extension of time to lodge a Notice of Appeal and stay of execution of the Court of Appeal's orders as to costs, the applicant has not referred to any constitutional Articles which she alleges will be violated if time is not extended. Relying on the case of Rutogot Farm Ltd vs. Kenya Forest Service and 3 others [2018] eKLR and Munya 1, the 4th and 8th respondents urge that none of the superior courts below interpreted or applied the Constitution to warrant this Court's exercise of jurisdiction.
23. Furthermore, citing the County Executive of Kisumu Case and the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others, SC Application No. 16 of 2014; [2014] eKLR (the Nick Salat Case), the 4th and 8th respondents submit that Petition No. E004 of 2021 was filed out of time contrary to Rule 38(1) of the Supreme Court Rules, 2020. It is also urged that the Notice of Appeal was not transmitted to the Supreme Court within the timelines set out under Rule 36(3) of the Supreme Court Rules, 2020. Ultimately, they submit that the application for extension of time is an afterthought, flawed, frivolous, vexatious and an abuse of the Court's process. They seek this Court to dismiss the same with costs.

iv. The 5th and 9th respondents

24. The 5th and 9th respondents submit that the applicant has not satisfied the conditions for extension of time. They urge that the instant application was filed 65 days after delivery of judgement of the Court of Appeal and that there is no evidence, either by way of follow up emails or letters to justify the delay in submitting the Notice of Appeal and filing the appeal. They contend that the applicant's emails, dated 14th January 2021 and 16th January 2021, were sent way past the set timelines and that the same fail to explain the entire delay as decided in the Nick Salat Case.
25. The 5th and 9th respondents urge that the applicant cannot to seek an extension of time to lodge a Notice of Appeal when she has already filed a petition of appeal. The 5th and 9th respondents support the finding of the superior courts below and urge that they shall be prejudiced if the application is allowed; the applicant has not demonstrated imminent threat of execution of the Court of Appeal's Judgment; the applicant has been indolent in bringing the instant application; and the Court should not exercise its discretion in her favour. They conclude by urging us to dismiss the application with costs.

v. The 6th and 10th respondents'

26. The 6th and 10th respondents submit that this Court lacks jurisdiction to extend time and admit the Notice of Appeal. While citing Article 163(4)(a) of the Constitution and the case of Lawrence Nduttu & 6000 others vs. Kenya Breweries Ltd & another, SC. Petition No. 3 of 2012; [2012] eKLR, the 6th and 10th respondents urge that the main issue for determination before the ELRC was whether the re-appointment of the interested parties as VCs of the 2nd to 6th respondents violated Articles 2, 3, 10, 35, 232 and Section 7 of the 6th Schedule of the Constitution and Section 39(1)(a) of the Universities Act, thereby rendering the issue for determination to be purely the interpretation of the Universities Act. They contend that, at the Court of Appeal, the issues were settled as res judicata hence not warranting this Court's exercise of jurisdiction.



27. The 6th and 10th respondents also reiterate the view that the applicant did not file her Notice of Appeal in time on her own accord. They submit that upon filing the Notice of Appeal electronically she was duty bound to furnish the Court with a physical copy pursuant to Rule 12(1) of the Supreme Court Rules, 2020 and Part III Paragraph 13 of the Supreme Court Practice Directions, 2020. They further urge that even if there might have been challenges to the online filing system, the applicant ought to have delivered a physical copy to the Court or file the appeal and later file the Notice of Appeal as an additional document.
28. The 6th and 10th respondents also submit that the applicant's prayer for stay on payment of costs is legally misinformed. In that context, they urge that the application before us is a stand-alone one and cannot be predicated upon a substantive matter before this Court. They submit that Petition E004 of 2021 was filed out of time hence, not proper before us. They anchor their arguments on this Court's decision in the case of Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 Others SC Petition No. 27 of 2014: [2014] eKLR and Hassan Jimal vs. Ibrahim Noor Hussein & 2 others, SC Civil Application No. 35 of 2018; [2019] eKLR. They add that the application is an abuse of the Court process and a waste of judicial time and resources. They urge us to dismiss the same with costs.

D. ISSUES

29. From the pleadings on record, it is clear to us that the application raises two issues for determination, namely:
 - i. Whether this Court should grant an extension of time for the applicant to admit a Notice of Appeal?
 - ii. Whether the Petition E004 OF 2021 is proper to justify stay the Court of Appeal's order as to costs?

E. Analysis and Determination

30. The 3rd and 7th respondents as well as the 4th and 8th respondents have separately filed Notices of Preliminary Objection both dated 8th March 2021, disputing this Court's jurisdiction to entertain the applications as well as the intended appeal as already set out. Of note at this juncture is the objection on the ground that the Notice of Appeal does not disclose the specific Article of the Constitution the intended appeal is anchored on; the application is premised on the Civil Procedure Rules, 2012 as opposed to the Supreme Court Rules rendering the application bad in law and an abuse of the court process.
31. We note that the other points of objection raised by the 3rd, 4th, 7th and 8th respondents in their preliminary objections touch on the merits of the Notice of Appeal and the intended appeal which is not subject of determination at this point. Consequently, we have considered the Preliminary Objections in the context of the respondent's opposition to the application.
32. As to whether this Court should grant an extension of time for the applicant to admit a Notice of Appeal, the applicant submits in the affirmative and blames the Court of Appeal Registry for delaying in lodging her Notice of Appeal and subsequently, lodging and backdating it at her disadvantage. She also blames the Covid-19 pandemic which saw the Court of Appeal limit in-person visits at its offices and encouraged online modes of communication. Conversely, the respondents urge that: in the absence of proof that the Notice of Appeal was lodged late and backdated, it is impossible to consider this argument; that there is no evidence that the applicant followed up the lodging of the Notice of Appeal; and that if time is extended, they will be prejudiced.



33. Rule 15(2) of the Supreme Court Rules, 2020 grants this Court the discretion to extend the time limited by the Rules or any decision of the Court.
33. Under Rule 36(1) of the Supreme Court Rules, 2020 a Notice of Appeal shall be filed within 14 days from the date of judgment or ruling which is subject of appeal. It is the responsibility of the appellant to transmit a copy of the Notice of Appeal to the Registrar of the Supreme Court and serve, within seven days, the transmitted copies of the Notice upon all persons affected by the appeal.
34. According to Rule 38(1) of the Supreme Court Rules, 2020, a petition to the Court shall be filed within thirty days of the date of filing the Notice of Appeal, where the appeal is as of right. In that regard, the applicant ought to have filed her petition of appeal and record of appeal by 30th December 2020.
35. This Court has set the guiding principles on extension of time in the Nick Salat Case as follows:
- “... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.
- “... we derive the following as the underlying principles that a Court should consider in exercising such discretion:
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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents, if 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.”
36. Further, this Court has 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 in the case of County Executive of Kisumu Case.
37. In the present case, the judgment of the Court of Appeal was delivered on 20th November 2020. Consequently, the Notice of Appeal ought to have been filed and transmitted to this Court by 4th December 2020 being the fourteenth day from the date of judgment under Rule 36. Having perused the record, it is clear to us that the applicant’s Notice of Appeal was filed on 1st December 2020 and lodged on even date. This therefore implies that the Notice of Appeal was filed on time. However, the same was not be transmitted to this Court within the above timelines.



38. Although the applicant has attributed the delay to file the appeal and transmit the Notice of Appeal on time to the officer responsible for lodging documents at the Court of Appeal, she has not annexed an affidavit from the said process server to enable us to validate her justification for the delay. The applicant has also failed to validate the delay in bringing the present application from the date she realized that the time for instituting the appeal and forwarding the Notice of Appeal to this Court had lapsed. Consequently, it is our unanimous finding that the applicant has failed to meet the criteria set by this Court for extension of time.
39. On the second issue, whether Petition No. E004 of 2021 is proper to justify a stay of the Court of Appeal's order on costs, the applicant submits that she filed Petition No. E004 of 2021 on 11th February 2021, being the last day from the date she received the lodged Notice of Appeal. As found above, the last filing date for the petition before this Court was 30th December 2020. The effect of this finding is that the Petition No. E004 of 2021 is null and void for being filed out of time and without leave hence, struck out. Therefore, in the absence of a substantive appeal on record, we are unable to grant the orders of stay of execution of the Order on costs in Civil Appeal No.120 as sought.
40. Ultimately, we find that the application herein lacks merit and is hereby dismissed. As this ruling effectively brings to an end the proceedings before this Court, we do not see any need to extend the dispute to the limited question of costs. Accordingly, each party to bear its own costs

F. Orders

41. The final orders are as follows:
- i. The Notice of Motion dated 17th February 2021 and filed on 23rd February 2021 is hereby dismissed.
 - ii. Petition No. E004 of 2021 filed electronically on 11th February 2021 is hereby struck out for being filed out of time.
 - iii. Each party to bear its own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JULY, 2021

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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

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar, Supreme Court of Kenya

