



**Babayao v Republic (Petition (Application) 2 of 2020)
[2020] KESC 11 (KLR) (23 September 2020) (Ruling)**

Ferdinand Ndungu Waititu Babayao v Republic [2020] eKLR

Neutral citation: [2020] KESC 11 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) 2 OF 2020
DK MARAGA, CJ & P, MK IBRAHIM, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ
SEPTEMBER 23, 2020**

BETWEEN

FERDINAND NDUNGU WAITITU BABAYAO PETITIONER

AND

REPUBLIC RESPONDENT

(Being an application for leave to file Supplementary Record of Appeal out of time)

The delay in filing a supplementary record of appeal occasioned by inability to obtain the order and certified copies of typed court proceedings is a valid reason to allow extension of time

The application filed by the petitioner contended that the delay in filing the supplementary record of appeal dated July 30, 2020 and filed on August 5, 2020 was occasioned by the inability to obtain the order and certified copies of typed court proceedings from the Court of Appeal despite request made on December 30, 2019. The delay in filing a supplementary record of appeal occasioned by inability to obtain the order and certified copies of typed court proceedings is a valid reason to allow extension of time

Reported by Sharon Sang & Kakai Toili

Civil Practice and Procedure – appeals – appeals to the Supreme Court – timelines for filing appeals – extension of time – extension of time to file a supplementary record of appeal – whether the delay in filing the supplementary record of appeal occasioned by inability to obtain the order and certified copies of typed court proceedings from the Court of Appeal was a valid reason to allow extension of time – Supreme Court Act, 2011, section 21(3); Supreme Court Rules, 2012, rule 53

Jurisdiction – jurisdiction of the Supreme Court – jurisdiction of the Supreme Court on application for extension of time – when could the Supreme Court allow an application for extension of time – whether the Supreme Court had the jurisdiction to determine and allow an application for leave to extend time – Supreme Court Rules, 2012, rule 53.



Brief facts

The application filed by the petitioner contended that the delay in filing the supplementary record of appeal dated July 30, 2020 and filed on August 5, 2020 was occasioned by the inability to obtain the order and certified copies of typed court proceedings from the Court of Appeal despite request made on December 30, 2019. The respondent did not file any response or submission with regard to the application despite directions issued by the deputy registrar that submissions ought to be filed by August 28, 2020.

Issues

- i. Whether the Supreme Court had the jurisdiction to determine and allow an application for leave to extend time.
- ii. Whether the delay in filing the supplementary record of appeal occasioned by inability to obtain the order and certified copies of typed court proceedings from the Court of Appeal was a valid reason to allow extension of time.

Relevant provisions of the Law

Supreme Court Act, No 7 of 2011

Section 21 – General Powers

(3) The Supreme Court may make any order necessary for determining the real question in issue in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Supreme Court thinks fit to determine before final judgment in the appeal.

Supreme Court Rules, 2012

Rule 53

The Court may extend the time limited by these Rules, or by any decision of the Court.

Held

1. The Supreme Court had the jurisdiction to consider and determine an application for leave to extend time to do anything required by its rules in accordance with section 21(3) of the Supreme Court Act and rule 53 of the Supreme Court Rules, 2012. The application by the petitioner dated August 7, 2020 and filed on August 11, 2020 satisfied the principles set out by the Supreme Court on extension of time.
2. The petitioner had provided sufficient grounds and reasons for the delay in filing the supplementary record of appeal as the delay in obtaining the order and certified typed copies of proceedings from the Court of Appeal was an administrative issue that could not and should not be held against the petitioner.
3. The respondent had not opposed the application neither had he shown what prejudice would be occasioned upon him if the applicant's application was allowed.

Application allowed: each party to bear its own costs.

Orders

- i. *The supplementary record of appeal dated July 30, 2020 and filed on August 5, 2020 was deemed duly and properly filed.*
- ii. *Parties to appear before the deputy registrar for further directions.*

Citations

Statutes

None referred to

Advocates

None mentioned



RULING

1. Upon perusing the Notice of Motion application by the Petitioner/Applicant dated 7th August 2020 and filed on 11th August 2020, which application is brought pursuant to leave granted by the Deputy Registrar on 14th July 2020 as well as Rule 15 of the Supreme Court Rules, 2020; and
2. Upon perusing the supporting affidavit of Counsel for the Petitioner/ Applicant, Prof. T.O. Ojienda, SC, deposed to on 7th August 2020; and
3. Upon considering the written submissions by the Petitioner/Applicant dated 10th August 2020 and filed on 11th August 2020 wherein the Applicant/Petitioner contends that the delay in filing the Supplementary Record of Appeal dated 30th July 2020 and filed on 5th August 2020 was occasioned by inability to obtain the order and certified copies of typed Court proceedings from the Court of Appeal timeously despite request made on 30th December 2019 and noting;

That the Respondent did not file any response or submissions with regard to the application despite directions issued by the Deputy Registrar on 14th August 2020, 19th August 2020 and 26th August 2020 that submissions ought to be filed by 28th August 2020. We have however seen submissions purportedly filed by the Respondent on 16th September 2020 which are hereby rejected for being filed out of time contrary to Rule 31(4) of these Court Rules 2020; and

4. Having considered the application and the submissions filed by the Petitioner/Applicant, by a unanimous decision of this Bench, we find that;
 - (a) This Court has the jurisdiction to consider and determine an application for leave to extend time to do anything required by its Rules - see *Anuar Loitip v. Independent Electoral & Boundaries Commission SC Petition (App.) No. 18 of 2018; [2018] eKLR* as well as Section 21(3) of the Supreme Court Act and Rule 53 of the Supreme Court Rules, 2012;
 - (b) That the application by the Petitioner/Applicant dated 7th August 2020 and filed on 11th August 2020 satisfies the principles set out by this Court in *Base Titanium Limited v. County Government of Mombasa & another SC Petition (App). No. 22 of 2018* and earlier in *Nicholas Kiptoo Arap Korir Salat v. Independent Electoral & Boundaries Commission & 7 others SC (App) No. 16 of 2014; (2014) eKLR* on extension of time;
 - (c) We also find that the Petitioner/Applicant has provided sufficient grounds and reasons for the delay in filing the Supplementary Record of Appeal as the delay in obtaining the order and certified typed copies of proceedings from the Court of Appeal is an administrative issue that cannot and should not be held against the Petitioner/Applicant;
 - (d) The Respondent has not opposed the application neither has he shown what prejudice shall be occasioned upon him if the Applicant's application is allowed.
5. In the circumstances, we now make ORDERS as follows;
 - (a) The Notice of Motion application by the Petitioner dated 7th August 2020 and filed on 11th August 2020 is hereby allowed;
 - (b) The Supplementary Record of Appeal dated 30th July 2020 and filed on 5th August 2020 is deemed as duly and properly filed;
 - (c) The parties to appear before the Deputy Registrar for further directions;



(d) Each party shall bear its costs.

6. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2020

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D.K. MARAGA

CHIEF JUSTICE & 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

