



**Nyamboki v Gathuru (Application 6 of 2019) [2019] KESC 44 (KLR) (30 April 2019) (Ruling)**

*Harun Ogoro Nyamboki v Peter Mujunga Gathuru [2019] eKLR*

Neutral citation: [2019] KESC 44 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
APPLICATION 6 OF 2019**

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

**APRIL 30, 2019**

**BETWEEN**

**HARUN OSORO NYAMBOKI ..... APPLICANT**

**AND**

**PETER MUJUNGA GATHURU ..... RESPONDENT**

*(Being an application for extension of time to file and serve a Notice of Appeal and an Appeal out of time against the Ruling and Orders of the Court of Appeal (Karanja, Warsame & Azangalala, JJ.A) in Civil Appeal No. 184 of 2004 dated and delivered at Nairobi on the 27th May, 2016)*

**Factors to consider in determining whether to allow an application for extension of time to file an appeal at the Supreme Court**

*The instant application sought an extension of time to file an appeal out of time. The court highlighted factors to consider in determining whether to allow an application for extension of time to file an appeal at the Supreme Court.*

Reported by Kakai Toili & Flora Weru

**Civil Practice and Procedure** - appeals to the Supreme Court - timelines for filing appeals - extension of time for filing appeals - factors to consider - what were the factors to consider in determining whether to allow an application for extension of time to file an appeal at the Supreme Court.

**Brief facts**

The applicant filed the instant application seeking an extension of time to file an appeal out of time. The applicant contended that the delay in filing the notice of appeal was occasioned by the mistaken knowledge and belief that his former advocates had filed the notice of appeal in the Court of Appeal, and that he should not be punished for counsel's error. The applicant also contended that the applicant only became aware of the advocates' failure to file the notice in December 2018.



## Issues

- i. What were the factors to consider in determining whether to allow an application for extension of time to file an appeal?

## Held

1. In determining an application for extension of time to file an appeal out of time, the Court had to consider;
  - a. whether the explanation given for any delay was reasonable and credible;
  - b. whether there also existed extenuating circumstances to enable the Court exercise its unfettered jurisdiction; and
  - c. that the delay, in any event, should not be so inordinate as to leave no doubt, that an applicant had been slothful, and filed such an application as an after-thought.
2. In the instant case, the 4 year and 2 month delay had neither been adequately explained, nor was the justification offered by the applicant credible. The delay was both untenable and unreasonable.

*Application dismissed, applicant to bear costs.*

## Citations

### Statutes

None referred to

### Advocates

None mentioned

## RULING

1. Upon perusing the Notice of Motion Application by the applicant dated 20<sup>th</sup> February 2019, brought under Section 3 of the Supreme Court Act and Rules 3(2) & (5), 31, 33 and 53 of the Supreme Court Rules 2012, seeking an extension of time to file an appeal out of time against the Judgment and Orders of 27<sup>th</sup> May, 2016 the Court of Appeal in Civil Appeal No. 184 of 2004; and
2. Upon reading the Applicant's grounds in support of the application and the supporting affidavit sworn on 20<sup>th</sup> February, 2019; and
3. Upon considering the applicant's written submissions dated 20<sup>th</sup> February, 2019 and filed on 22<sup>nd</sup> February, 2019 wherein the applicant submits that the delay in filing the Notice of appeal was occasioned by the mistaken knowledge and belief that his former advocates Messers Oraro and Company Advocates, had filed the Notice of Appeal in the Court of Appeal, and that he should not be punished for counsel's error; that the Applicant only became aware of the advocates' failure to file the Notice in December 2018; that further, the Applicant was advised by its advocates on record, that his case required certification before admission to the Supreme Court as was the principle set in Re The Matter of the Interim Independent Electoral Commission, Appeal No. 2 of 2011; that the decision of this Court in Geoffrey Asanyo & 3 Others v. the Attorney General Petition No. 21 of 2015 has established an exemption to the principles in the Re Interim Case allowing the Supreme Court to exercise its inherent jurisdiction to right jurisdictional wrongs committed by the superior Courts, in instances where the issues of appeal have not arisen through the judicial hierarchy; and, that the said decision has therefore presented the Applicant with a new shot at justice; and
4. Upon reading the respondent's replying affidavit sworn on 13<sup>th</sup> March 2019 and filed on 15<sup>th</sup> March 2019 in which he opposed the Application, on the basis that the same had been filed out of time, with no credible explanation for the inordinate delay; and that since the Applicant's applications for



certification under Article 163(4)(b) and under Article 163 (5) of the Constitution had been dismissed by the Court of Appeal and this Court respectively, the present Application is an afterthought, replete with falsehoods and deliberate distortion of facts, in an attempt to mislead the Court; and

5. Upon considering the respondent's written submissions dated 13<sup>th</sup> March 2019 and filed on 15<sup>th</sup> March, 2019 in which, the respondent argues that this court has no jurisdiction to hear and determine this application, having heard and dismissed the application for certification under Article 163 (5) of the Constitution; that the delay is inordinate, inexcusable and/or unreasonable; that he has suffered great prejudice since 1983 and will continue to suffer should the application be allowed; and, that the Application is an afterthought and an abuse of Court process;
6. We find as follows;
  - a. The jurisprudence of this Court on the considerations for grant or denial of an application for extension of time was well expressed in *Nicholas Kiptoo Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others* Application No. 16 of 2014 and *Hassan Nyanje Charo v. Khatib Mwashedani & 3 Others* SC Application No. 15 of 2014; and
  - b. In determining such an application, the Court has to consider whether the explanation given for any delay is reasonable and credible; whether there also exist extenuating circumstances to enable the Court exercise its unfettered jurisdiction; and that the delay, in any event, should not be so inordinate as to leave no doubt, that an applicant has been slothful, and filed such an application as an after-thought.
  - c. In the present case, the four year (4) and two month (2) has neither been adequately explained, nor is the justification offered by the applicant credible. The delay is both untenable and unreasonable.
7. Having considered the Application and the Affidavit in support filed in support thereto, the Replying Affidavit in opposition thereof, and the written submissions of the respective parties, by a unanimous decision of this Bench, we make the following Orders under Section 23(2) (b) of the Supreme Court Act 2011, and Rules 21 and 23 of the Supreme Court Rules, 2012;

#### **Orders**

- i. The application dated 20th February, 2019 and filed on 22<sup>nd</sup> February, 2019 is hereby dismissed.
- ii. The Applicant shall bear the costs of this application.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF APRIL 2019.**

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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**

.....

**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**

