



**Kombe v Sheikh & 4 others (Petition (Application) 5 of 2019)
[2019] KESC 84 (KLR) (Civ) (17 December 2019) (Ruling)**

Emmanuel Changawa Kombe v Mohamed Ali Sheikh & 4 others [2019] eKLR

Neutral citation: [2019] KESC 84 (KLR)

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

CIVIL

PETITION (APPLICATION) 5 OF 2019

MK IBRAHIM, JB OJWANG, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

DECEMBER 17, 2019

BETWEEN

EMMANUEL CHANGAWA KOMBE APPLICANT

AND

MOHAMED ALI SHEIKH 1ST RESPONDENT

ABDIWAHAB SHEIKH OSMAN HATHE 2ND RESPONDENT

ABDULLAHI MOHAMED OLOW 3RD RESPONDENT

ISSACK MUHUMED MOHAMED 4TH RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 5TH
RESPONDENT**

(Being an application for extension of time to file an appeal, to deem the appeal on record as properly filed, to amend the appeal and for leave to file a supplementary Record of Appeal against the Ruling and Orders of the Court of Appeal (Visram, Nambuye, Musings, Odek & Gatembu JJ.A) in Election Appeal No. 32 of 2018 (Application No. 261 of 2018) delivered at Nairobi on the 19th December, 2018)

The appropriate remedy for curing a delay in filing an appeal is to seek a court order for extension of time for filing

Reported by Kakai Toili

Civil Practice and Procedure – appeals – timelines for filing appeals – where a party sought to file an appeal out of time – remedies available - what was the appropriate remedy for curing a delay in filing an appeal out of time - Supreme Court Act, 2011, section 23(2)(b); Supreme Court Rules, 2012, rules 21 and 23



Brief facts

The applicant filed the instant application seeking an extension of time to file an appeal and record of appeal out of time against the ruling and orders of the Court of Appeal. The appellant also prayed for the appeal and record filed to be deemed as properly on record, for leave to amend the appeal and for leave to file a supplementary record of appeal.

The applicant alleged that that the delay in filing the appeal and record of appeal was occasioned by circumstances beyond his control, namely;

1. the delay in getting certified copies of typed proceedings from the Court of Appeal within the stipulated 30 days from the date of filing the notice of appeal;
2. that on the last day on which the applicant would have filed the appeal, the court's registry was closed and that upon inquiry, the applicant was informed that the registry staff members were attending a training in Naivasha;
3. that the registry remained closed until when the applicant lodged his appeal, but was advised to effect certain corrections thereto; and that wasn't until when the appeal and record of appeal were finally presented and lodged, thus occasioning a six-day delay.

Issues

What was the appropriate remedy for curing a delay in filing an appeal out of time?

Held

The applicant had provided a plausible and reasonable explanation for the delay in filing of his appeal and record of appeal. The delay in the circumstances was not inordinate. The appropriate remedy for curing a delay in filing an appeal was to seek an order from the court, extending the time within which to file the same. The court took a dim view of applications asking the court to deem as properly filed, those appeals that had been lodged out of time.

Application partly allowed

Orders

- i. *Applicant to file the appeal and record of appeal within 14 days from the date of the ruling.*
- ii. *The purported appeal, to wit, Petition No. 5 of 2019 struck out and expunged from the court's record.*
- iii. *Costs to abide the cause.*

Citations

Statutes

1. Supreme Court Act

Advocates

None mentioned

RULING

- 1 Upon perusing the Notice of Motion Application dated 24th March 2019, brought under Sections 3, 12, and 24 of the [Supreme Court Act](#), 2011 and Rules 3, 8, 23, 26 and 53 of the Supreme Court Rules, 2012, seeking an extension of time to file an appeal and record out of time against the Ruling and Orders of 19th December, 2018 by the Court of Appeal in Election Appeal No. 32 of 2018 Application No. 261 of 2018, for the appeal and record filed on 6th February, 2019 to be deemed as properly on record, for leave to amend the Appeal and for leave to file a supplementary record of appeal; and
- 2 Upon reading the Applicant's grounds in support of the Application and the Supporting Affidavit sworn on 14th March, 2019 by Omagwa Angima, wherein the deponent states that the delay in filing



the Appeal and Record of Appeal, was occasioned by circumstances beyond the Applicants control, namely;

- i The delay, in getting certified copies of typed proceedings from the Court of Appeal within the stipulated 30 days from the date of filing the Notice of Appeal;
- ii That on 1st February 2019, the last day on which, the Applicant would have filed the Appeal, this Court's registry was closed, and that Upon inquiry, the Applicant was informed that the registry staff members were attending a training in Naivasha;
- iii That the registry remained closed, until the 4th of February 2019, when the applicant lodged his Appeal, but was advised to effect certain corrections thereto; and
- iv That it wasn't until the 6th of February 2019, when the Appeal and Record of Appeal were finally presented and lodged, thus occasioning a six-day delay.

3 Upon considering the Applicant's written submissions dated 9th May, 2019 and filed on 10th May, 2019 wherein the Applicant restates the grounds in support of the application, and in addition submits that the Record as filed is incomplete, as it is not in keeping with Rule 33 g and h of the Supreme Court Rules, 2012; and

4 Upon noting that the Respondents have not complied with the directions of this Court issued on 8th of April 2019, 3rd of June 2019, and 3rd of July 2019;

5 We Find as follows:

- a In keeping with the decision of this Court in Nicholas Kiptoo Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others Application No. 16 of 2014 and Hassan Nyanje Charo v Khatib Mwashetani & 3 Others SC Application No. 15 of 2014; we are satisfied that the applicant has provided a plausible and reasonable explanation for the delay in filing of his Appeal and Record of Appeal. We are further satisfied that the delay in these circumstances was not inordinate.

7 We also restate and re-affirm the principle enunciated in Nicholas Kiptoo Korir Salat Supra that the appropriate remedy, for curing a delay in filing an appeal, is to seek an Order from the Court, extending the time within which, to file the same. We still take a dim view of applications, asking the Court to deem as properly filed, those appeals that have been lodged out of time.

8 Having made the foregoing determinations, 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 March 24, 2019 seeking the extension of time to file the Appeal and Record of appeal is hereby allowed;
- ii Applicant shall file the Appeal and Record of Appeal within 14 days from the date of this Ruling;
- iii The purported Appeal, to wit, Petition No. 5 of 2019 is hereby struck out and expunged from the Court's Record;
- iv The Costs of this Application shall abide the cause.

Orders accordingly.



DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2019.

M. K. IBRAHIM J. B. OJWANG

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

S. C. WANJALA NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar

Supreme Court Of Kenya

