



**Gitonga & 3 others v Independent Electoral & Boundaries Commission & 17 others
(Civil Application 41 of 2014) [2018] KESC 39 (KLR) (Civ) (8 May 2018) (Ruling)**

*Naomi Wangechi Gitonga & 3 others v Independent Electoral
& Boundaries Commission & 17 others [2018] eKLR*

Neutral citation: [2018] KESC 39 (KLR)

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

CIVIL

CIVIL APPLICATION 41 OF 2014

**PM MWILU, AG.CJ & AG. P, MK IBRAHIM, JB
OJWANG, SC WANJALA & NS NDUNGU, SCJJ**

MAY 8, 2018

BETWEEN

**NAOMI WANGECHI GITONGA 1ST APPLICANT
HANNAH WARUKIRA KABUI 2ND APPLICANT
ANN NYAMBURA WANG'OMBE 3RD APPLICANT
LEAH MUMBI NJOROGE 4TH APPLICANT**

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT
ROSE WAIRIMU KAMAU 2ND RESPONDENT
SALOME WAIRIMU KAGO 3RD RESPONDENT
ELIZABEH MUTHONI WANJAU 4TH RESPONDENT
MARY MUTHONI NJERU 5TH RESPONDENT
THE NATIONAL ALLIANCE PARTY 6TH RESPONDENT
KEZIAH WARUINU MWANGI 7TH RESPONDENT
LUCY NYAGUTHII 8TH RESPONDENT
JECINTA WAMBUI WAMAE 9TH RESPONDENT
MARY WAIRIMU MURAGURI 10TH RESPONDENT**



KANYI KING'ORI	11 TH RESPONDENT
REGINA WANJIRU MACHARIA	12 TH RESPONDENT
JOSEPHINE MUTHONI MUREITHI	13 TH RESPONDENT
ELIZABETH WANGUI NJEE	14 TH RESPONDENT
LUCY MUGURE WANYITU	15 TH RESPONDENT
NANCY WANJIKU GACHOCHIO	16 TH RESPONDENT
SALIMA ULEDI	17 TH RESPONDENT
ANASTACIA WANJIRU NJUKA	18 TH RESPONDENT

(Being an application for extension of time to file a notice of appeal against the Judgment and Orders of the Court of Appeal in Nairobi Civil Appeal No. 169 of 2013, Rose Wairimu Kamau & Others v. The IEBC (Maraga, Mwera and J. Mohammed JJ.A) dated 8th November, 2013 and for review of the decision of the Supreme Court contained in a Ruling dated 18th March, 2014.)

Supreme Court dismisses an application for extension of time where the application failed to give cogent reasons for the delay.

The Constitution and the electoral law envisaged the entire process of nomination for the special seats, including the act of gazettelement of the nominees' names by the IEBC as an integral part of the election process. Being an electoral dispute, the parties were bound by the imperative of time. There was nothing that prevented the applicants from filing a notice of appeal against the decision of the Court of Appeal, even as they pondered their next course of action.

Reported by Felix Okiri

Election Law - election appeals - extension of time for filing election appeal - whether the Supreme Court could extend time to file an election petition appeal out of time - whether the applicant had laid satisfactory basis to warrant the Court to extend time to file the appeal - Supreme Court Rules, 2012, Rule 31(1).

Constitutional Law - Supreme Court - appeals from Court of Appeal to Supreme Court - certification of a Notice of Appeal raising matters of general public importance - whether the intended appeal raised any constitutional matters that warranted appeal – whether the two - Judge Bench in the Supreme Court should have addressed the application for extension of time, without digressing into a determination of the question whether the intended appeal had met the criteria set out in article 163 (4) (a) of the Constitution - Constitution of Kenya, 2010, article 164(4).

Brief facts

In compliance with the orders of the Court of Appeal, the Independent Electoral and Boundaries Commission (IEBC) published the TNA party list, in which it deleted the names of the applicants as nominated members of the Nyeri County Assembly on November 29, 2013.

Being aggrieved by the Court of Appeal's decision, the applicants (who were not parties to the proceedings at the Court of Appeal) filed an application out of time before the Supreme Court seeking extension of time to file a notice of appeal at the Court of Appeal.

The applicants submitted that they filed the application out of time as they were not sure whether the proper forum was the Magistrate's Court in which case they would file an election petition, or the Supreme Court, in which case they would file an appeal.



Issues

- i. Whether the Supreme Court could grant an extension of time for the applicants to file a notice of appeal and a petition of appeal.
- ii. What were the principles to be considered in an application for extension of time?
- iii. Whether the application for extension of time met the criteria set in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2015] eKLR.
- iv. Whether an application for extension of time ought to be heard without digressing into a determination of the question whether the intended appeal had met the criteria set out in article 163 (4) (a) of the Constitution.

Relevant provisions of the Law

Supreme Court Rules

Rule 31(1)

A person who intends to appeal to the Court shall file a notice of appeal within fourteen days from the date of Judgment or Ruling, in Form B set out in the First Schedule, with the Registrar of the Court or with the tribunal it is desired to appeal from.

Held

Per PM Mwilu, AG CJ & AG P; MK Ibrahim, JB Ojwang, and SC Wanjala, SCJJ (Majority Decision)

1. Rule 31(1) of the Supreme Court Rules provided that a notice of appeal was to be filed within 14 days of the delivery of judgment. A notice of appeal was a primary document to be filed outright whether or not the subject matter under appeal was that which required leave or not. It was a jurisdictional prerequisite.
2. The applicants had 14 days from the date of delivery of the judgment of the Court of Appeal to file a notice of appeal. Consequently, the applicants did not file the notice of appeal on or before the November 22, 2013 since the Court of Appeal judgment was delivered on November 8, 2013. Instead, the applicants waited till the February 13, 2014. That was 96 days after the delivery of the Court of Appeal judgment to move the court seeking to extend time within which to file the notice of appeal.
3. The applicants had sought to explain that delay on grounds that they did not know the appropriate forum in which to seek redress: an argument which, could not excuse such inordinate delay. To allow an intending appellant who had inordinately delayed in moving the appeal process, to come to the court and claim that he/she did not know whether to move the court or not, would be setting a negative precedent.
4. The second delay was with respect to the filing of the application for review. The impugned ruling was delivered on March 18, 2014. The applicants thereafter filed the application for review on November 20, 2014. That was approximately 235 days after the delivery of the ruling. No explanation was given for that delay. Instead, the applicants maintained that it was only to the court they could move, having been aggrieved by the appellate Court's judgment.
5. The court, for purposes of sustaining ends of justice, had an inherent jurisdiction to grant an application for the extension of time, to enable a party to pursue its cause. However, the court would only exercise that discretion in favour of an applicant, where the latter presented a compelling case justifying the inordinate delay.
6. Although the proceedings originated in the High Court as a constitutional petition, essentially, the cause was an electoral dispute, which ought to have been commenced by way of election petition before an election court entrusted with jurisdiction. The Constitution provided for two modes of election. The first was election in the conventional sense, of universal suffrage; the second was election by way of nomination, through the party list. It followed from such a conception of the electoral process, that any contest to an election, whatever its manifestation, was to be by way of an election petition.



7. It was not in doubt that in deleting the applicants' names from the nomination list, the IEBC was acting not on its own motion, but in compliance with the Court of Appeal's orders following the earlier suit filed in the appellate court by the respondents. In the circumstances, the most logical course of action open to the applicants was to appeal the decision and consequential orders of the Court of Appeal to the instant court.
8. The Constitution and the electoral law envisaged the entire process of nomination for the special seats, including the act of gazettelement of the nominees' names by the IEBC as an integral part of the election process. Being an electoral dispute, the parties were bound by the imperative of time. There was nothing that prevented the applicants from filing a notice of appeal against the decision of the Court of Appeal, even as they pondered their next course of action.
9. Although the two-judge bench in the instant court should have addressed the application for extension of time, without digressing into a determination of the question whether the intended appeal had met the criteria set out in article 163 (4) (a) of the Constitution, such action by the court, did not excuse the inordinate delay in filing the instant application by the applicants.

Dissenting opinion

Per N.S. Ndungu, SCJ (Dissenting)

1. The majority had found that there was inexcusable delay in filing of the application and had consequently dismissed it. However, since it was important to take into account the legal principles propounded by the court on extension of time in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2015] eKLR (Nick Salat Case). The ruling of the two-judge bench was rendered on March 18, 2014; while the *Nick Salat* ruling came later, on July 4, 2014. *Nick Salat case* set out cogent principles on extension of time applications which might be considered to represent the current jurisprudential state of affairs. The court had been categorical that, at the stage of an application for extension of time, an applicant only needed to demonstrate a *prima facie* case that raised issues of constitutional interpretation or application.
2. The Nick Salat case set out the following guiding principles on the question of extension of time.
 - 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 should 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 delay should be explained to the satisfaction of the court;
 - e. whether there would be any prejudice suffered by the respondents if the extension was granted;
 - f. whether the application had been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
3. It was apparent from the ruling of March 18, 2014 that after considering the question as to whether the intended appeal raised issues of constitutional interpretation and application, the two judge bench, had not considered the pertinent issue of extension of time. The question as to whether the applicants had demonstrated cause for the delay in filing the notice of appeal, to the satisfaction of the court, merited consideration.
4. For an application for extension of time to have met the criteria set in *Nick Salat case*, one of the requirements was that the applicant should furnish the court with sufficient reasons for the delay. The applicants had submitted that the reason for the delay was that the applicants were not party to the proceedings at the Court of Appeal; and so, after the appellate court delivered its judgment on November 8, 2013, the applicants waited for the National Alliance Party (TNA) to come up with



a list of nominees of Member of County Assembly Representatives, for gazettelement by the IEBC. When the list was finally gazetted on November 29, 2013 the applicants realized that their names were missing, and they sought to remedy the situation. The applicants were unclear as to the proper avenue to redress the substantial injustice they had suffered. It was not clear whether the proper forum was the Magistrate’s Court in which case the applicants would file an election petition, or the Supreme Court, in which case they would file an appeal.

5. The time gap between the date of delivery of judgment of the Court of Appeal (November 8, 2013), and the date of its implementation by the IEBC, which was the date of the gazettelement of the nomination list (November 29, 2013) was sufficient reason for the delay. That was because the prescribed period (14 days) for filing a notice of appeal had already lapsed. Further, the lack of clarity on the part of the applicants as to the proper forum to seek recourse for the grievances they had against the Court of Appeal decision was reason enough for the delay. That was especially because it appeared that the applicants were indirect parties in the matter before the Court of Appeal.
6. The prejudice likely to be occasioned was another factor that should be taken into account before an application for extension of time was allowed. In the instant matter it was evident that the respondents, with the exception of the IEBC, were sitting Members of the County Assembly of Nyeri; and thus, if the application was allowed, no prejudice would be occasioned on them. Conversely, the applicants would suffer prejudice if extension of time was denied.
7. The development of law on extension of time, by the *Nick Salat* ruling, provided a basis for reviewing the decision of the two-judge bench, and for extending time for filing a notice of appeal. The application would have been allowed.

Application dismissed; each party was to bear own costs.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

- [1]. The main issue for determination in this appeal is whether this Court should grant an extension of time for the applicants to file a notice of appeal and a petition of appeal.
- [2]. It was the applicants’ submission that, they had satisfied the requirements laid down by this Court for an application for extension of time to be allowed, in *Nicholas Kiptoo arap Korir Salat v. Independent Electoral and Boundaries Commission and 7 Others*, Sup. Ct Application No. 16 of 2014.
- [3]. In response, all the respondents submitted that the applicants were guilty of inordinate delay, and had not provided sufficient reason for the delay in filing the notice of appeal. They submitted that the application for review had no merit, and the same should be dismissed.
- [4]. Further, the 1st respondent contended that the applicants were forum- shopping in the Chief Magistrate’s Court, the High Court, and this Court. The respondent argued that if the applicants were indeed aggrieved by the Supreme Court’s decision (dismissing their application for extension of time) delivered on 18th March, 2014, they ought to have sought a review of the same, instead of proceeding with the election petition at the Chief Magistrate’s Court in Nyeri and the Election Appeal Nos. 30 and 31 of 2014.



- [5]. Counsel for the 7th to 9th, and 13th to 18th respondents further argued that the applicants were guilty of inordinate delay in filing the application herein, since the Supreme Court Ruling which is sought to be reviewed, was delivered on 18th March, 2014, while this application was filed on 20th November, 2014.
- [6]. Looking at the record of appeal and the arguments presented before this Court, there are two aspects of delay that must be addressed: firstly, the initial delay in filing the notice of appeal; and secondly, the delay in filing this Application for review.
- [7]. Rule 31(1) of the Supreme Court Rules provides that a Notice of Appeal is to be filed within 14 days of the delivery of Judgment. It reads:
- A person who intends to appeal to the Court shall file a notice of appeal within fourteen days from the date of Judgment or Ruling, in Form B set out in the First Schedule, with the Registrar of the Court or with the tribunal it is desired to appeal from.”
- [8]. This position was aptly echoed by this Court in the decision of Nick Salat, where the Court held that:
- A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”
- [9]. The applicants, therefore, had 14 days from the date of delivery of the Judgment of the Court of Appeal, to file a Notice of Appeal. Consequently, the applicants ought to have filed the Notice of Appeal on or before the 22nd of November, 2013 since the Court of Appeal Judgment was delivered on 8th November, 2013. This, they did not do. Instead, the applicants waited till the 13th February, 2014, that is 96 days after the delivery of the Court of Appeal Judgment, to move this Court by application under certificate of urgency, accompanied with a supporting affidavit as well as a Notice of Motion with an affidavit in support, seeking to extend time within which to file the Notice of Appeal. The applicants have sought to explain this delay on grounds that they did not know the appropriate forum in which to seek redress: an argument which, in our view, cannot excuse such inordinate delay. To allow an intending appellant who has inordinately delayed in moving the appeal process, to come to this Court and claim that he/she did not know whether to move the Court or not, would be setting a negative precedent. Suffice it to say that this Court’s decision in Nick Salat, is no authority for such a proposition.
- [10]. The second delay is with respect to the filing of this application for review. The impugned Ruling was delivered by Ibrahim and Ojwang SCJJ on 18th March, 2014. The applicants thereafter filed the application for review on 20th November, 2014. This is approximately 235 days after the delivery of the Ruling. No explanation was given for this delay.
- [11]. Instead, the applicants maintained that it is only to this Court they could turn, having been aggrieved by the Appellate Court’s Judgment. There is no doubt that this Court, for sustaining ends of justice, has an inherent jurisdiction to grant an application for the extension of time, to enable a party to pursue its cause. However, the Court will only exercise this discretion in favour of an applicant, where the latter presents a compelling case justifying the inordinate delay.
- [12]. It is to be noted that although these proceedings originated in the High Court as a constitutional petition, essentially, the cause was an electoral dispute, which ought to have been commenced by way of election petition before an election Court, entrusted with jurisdiction. This Court has clearly pronounced itself on the nature of disputes revolving around the nomination of candidates on the basis of political party lists, under Article 177 (1) (b) (c) and (2) of the Constitution, in *Moses Mwigigi and Others v. The IEBC and Others*, Petition No. 1 of 2015. Confronted with the question as to



the procedure for challenging the nomination of County Assembly members by a political party, this Court stated thus:

It is clear to us that the Constitution provides for two modes of 'election'. The first is 'election' in the conventional sense, of universal suffrage; the second is 'election' by way of 'nomination', through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of an 'election petition'."

- [13]. Given the complex history of the proceedings leading to this application, it is necessary to reconsider the chronology of events, so as to place this dispute in perspective. Following the publication of a Gazette Notice designating the applicants herein as members of the Nyeri County Assembly (by the IEBC), the 2nd to 5th respondents herein filed Petition No. 236 of 2013, in the Constitutional and Human Rights Division of the High Court, against the Independent Electoral and Boundaries Commission (IEBC), challenging the nomination of the applicants. The petition was dismissed by the High Court, prompting the same parties to appeal to the Court of Appeal. The Court of Appeal directed that all parties whose interests were at stake be served with the record of appeal, and hearing notices (Paragraph 11 of the Court of Appeal Judgment).
- [14]. The Court invoked Rule 77 of the Court of Appeal Rules, and directed all the other gazetted TNA nominees, who stood to be affected by the Judgment, to be served with the record of appeal. All were served, though only five of them made submissions before the Court (including the 2nd and 3rd applicants herein).
- [15]. Pursuant to the directions issued by the Appellate Court, only two parties in the instant application (the 2nd applicant, Hannah Kabui, and the 3rd applicant, Anne Wangombe) entered appearance, and were allowed to make their submissions.
- [16]. On the 8th of November, 2013, the Court of Appeal delivered its Judgment allowing the appeal. Consequently, in compliance with the Orders of the Court, the IEBC in Gazette Notice No. 15096 issued on 29th November, 2013 and dated 25th November, 2013, published the TNA party list, in which it deleted the names of Naomi Wangechi Gitonga; Hannah Warukira Kabui; Ann Nyambura Wang'ombe; and Leah Njoroge (the applicants herein) as nominated members of the Nyeri County Assembly. The name of Salome Wairimu Kago, who was 2nd appellant at the Court of Appeal, was inserted in the list of nominees to the Nyeri County Assembly.
- [17]. Aggrieved by the actions taken by the IEBC, cancelling their initial nomination, the 1st to 4th applicants herein filed Election Petition No. 2 of 2013, dated 23rd December, 2013 at the Chief Magistrate's Court in Nyeri, challenging the deletion of their names from the Gazette Notice. They sued IEBC together with the 2nd, 6th to 18th respondents herein. The 2nd, 4th and 5th respondents were not parties to the suit at the Chief Magistrate's Court.
- [18]. On 13th February, 2014, the parties who had filed suit in the Chief Magistrate's Court, filed a Notice of Motion under certificate of urgency before the Supreme Court, seeking extension of time to file a notice of appeal at the Court of Appeal. It is at this juncture that the 1st applicant (Naomi Wangechi Gitonga) joined the suit for the first time. They sued IEBC together with four others (Rose Wairimu Kamau; Salome Wairimu Kago; Elizabeth Muthoni Kamau and Mary Muthoni Njeru 2nd, 3rd, 4th and 5th respondents respectively).
- [19]. It is not in doubt that in deleting the applicants' names from the nomination list, the IEBC was acting not on its own motion, but in compliance with the Court of Appeal's Orders following the earlier suit



filed in the Appellate Court by the respondents. Did the applicants really expect the Chief Magistrate's Court to overturn the Orders of a superior court^{3/4}in this instance, the Court of Appeal? Even if the Magistrate's Court were to err and purport to overturn the Orders of the Court of Appeal, would such decision stand on appeal to the High Court?

- [20]. In the circumstances, the most logical, nay, the only course of action open to the applicants, was to appeal the decision and consequential Orders of the Court of Appeal to this Court. This being an electoral dispute, the parties were bound by the imperative of time, as has been established by this Court in a number of election petition decisions, namely, *Munya v. Githinji*; *Wambui v. King'ara*; and *Joho v. Shahbal*. Indeed, had the applicants challenged the Court of Appeal's decision within the established timelines, they could have succeeded, going by the ratio decidendi in *Moses Mwicigi and Others v. the IEBC and Others*, wherein this Court rendered itself thus:

It is clear from the foregoing provisions that the allocation of nomination seats by the IEBC is a time bound process that starts with the proportional determination of the number of seats due to each political party. On that basis, IEBC then 'designates', or 'draws from' the allocated list the number of nominees required to join the County Assembly. To 'designate' or 'draw from' entails the act of selecting from the list provided by the political party. It is plain to us that the Constitution and the electoral law envisage the entire process of nomination for the special seats, including the act of gazettelement of the nominees' names by the IEBC as an integral part of the election process."

- [21]. This Court is now confronted with the unwieldy situation where the applicants, having been aggrieved by the Court of Appeal's decision, chose not to appeal against the decision within time, but instead filed an Election Petition at the Chief Magistrate's Court. The matter is further compounded by the fact that some of the applicants herein were not parties to the proceedings at the Court of Appeal. The explanation given by the applicants, for their failure to act in good time in accordance with the Constitution and the electoral laws, is not one that can afford them relief. There was nothing to prevent the applicants from filing a notice of appeal against the decision of the Court of Appeal, even as they pondered their next course of action.
- [22]. Counsel for the applicants has also faulted the two-Judge Bench for failing to consider the pertinent issue of extension of time, and instead, addressing the question whether the intended appeal raises issues of constitutional interpretation and application. However, while we agree with the assertion that the two-Judge Bench should have addressed the application for extension of time, without digressing into a determination of the question whether the intended appeal had met the criteria set out in Article 163 (4) (a) of the Constitution, such action by the learned Judges, in our view, does not excuse the inordinate delay in filing this application by the applicants.

A. Dissenting Opinion Of Njoki S. Ndungu, Scj

- [23]. The Majority have found that there was inexcusable delay in filing of the application and have consequently dismissed it. However, I am of a different opinion since it is important to take into account the legal principles propounded by this Court on extension of time, in *Nick Salat*. It is noteworthy that the Ruling of the two-Judge Bench was rendered on 18th March, 2014; while the *Nick Salat* Ruling came later, on 4th July, 2014. *Nick Salat* set out cogent principles on "extension of time applications" which may be considered to represent the current jurisprudential state of affairs. The Court had been categorical that, at the stage of 'application for extension of time', an applicant only needs to demonstrate a prima facie case that raises issues of constitutional interpretation or application.



The Court went further to set out certain guiding principles, on the question of extension of time. Such a position is expressed in the Nick Salat case (page 31):

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of 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 delay should be explained to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents if the 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.”

[24]. It is apparent from the Ruling of 18th March, 2014 that after considering the question as to whether the intended appeal raised issues of constitutional interpretation and application, the two-Judge Bench, had not considered the pertinent issue of extension of time. The question as to whether the applicants had demonstrated cause for the delay in filing the notice of appeal, to the satisfaction of the Court, merited consideration.

[25]. It is a relevant question, therefore, whether the application for extension of time met the criteria set in Nick Salat. One of the requirements is that the applicant should furnish the Court with sufficient reasons for the delay. Mr. Mungai, learned counsel for the applicants, submitted that the reason for the delay was that the applicants were not party to the proceedings at the Court of Appeal; and so, after the Appellate Court delivered its Judgment on 8th November, 2013, the applicants waited for the National Alliance Party (TNA) to come up with a list of nominees of Member of County Assembly Representatives, for gazettelement by the Independent Electoral and Boundaries Commission (IEBC).

[26]. Mr. Mungai urged that when the list was finally gazetted on 29th November, 2013 the applicants realized that their names were missing, and they sought to remedy the situation. Counsel further urged that the applicants were unclear as to the proper avenue to redress the substantial injustice they had suffered. He submitted that it was not clear whether the proper forum was the Magistrate’s Court in which case the applicants would file an election petition, or the Supreme Court, in which case they would file an appeal. In the meantime, counsel urged, the prescribed time for filing a notice of appeal had already lapsed.

[27]. I am of the view that the time-gap between the date of delivery of Judgment of the Court of Appeal (8th November, 2013), and the date of its implementation by the IEBC, which was the date of the gazettelement of the nomination list (29th November, 2013) is sufficient reason for the delay. This is because the prescribed period (14 days) for filing a notice of appeal had already lapsed. Further, I believe that the lack of clarify on the part of the applicants as to the proper forum to seek recourse for the grievances they had against the Court of Appeal decision is reason enough for the delay. This is



especially because it appears (but it is yet to be confirmed when the matter is heard on its merits) that they were indirect parties in the matter before the Court of Appeal.

[28]. The prejudice likely to be occasioned is another factor that should be taken into account before an application for extension of time is allowed. In the present matter it is evident that the respondents, with the exception of the IEBC, are sitting Members of the County Assembly of Nyeri; and thus, if the application is allowed, no prejudice will be occasioned on them. Conversely, the applicants will suffer prejudice if extension of time is denied.

[29]. I am, therefore, convinced that the development of law on extension of time, by the Nick Salat Ruling, provides a basis for reviewing the decision of the two-Judge Bench, and for extending time for filing a notice of appeal. I would have therefore allowed this application.

B. Orders

[30]. For these reasons, and given the fact that the cause before us is, in essence, an election dispute, which ought to have been resolved in a timely manner in accordance with the Constitution, we make the following Orders:

- i. The Application dated 14th November, 2014 is hereby dismissed.
- ii. Each Party shall bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MAY, 2018.

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P. M. MWILU M. K. IBRAHIM
DEPUTY CHIEF JUSTICE & JUSTICE OF THE SUPREME COURT
VICE-PRESIDENT OF THE SUPREME COURT

.....

J. B. OJWANG S. C. WANJALA
JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

.....

S. N. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA

