



**Lodinyo v Independent Electoral and Boundaries Commission & 2 others (Miscellaneous Application 27 of 2018) [2018] KESC 66 (KLR) (22 October 2018) (Ruling)**

*John Lokitare Lodinyo v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR*

Neutral citation: [2018] KESC 66 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
MISCELLANEOUS APPLICATION 27 OF 2018  
DK MARAGA, CJ & P, MK IBRAHIM, JB OJWANG, SC WANJALA & I LENAOLA, SCJJ  
OCTOBER 22, 2018**

**BETWEEN**

**JOHN LOKITARE LODINYO ..... APPLICANT**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**BONVENTURE OKOCHI OBONGOYA ..... 2<sup>ND</sup> RESPONDENT**

**MARK LOMUNOKOL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for extension of time to file a notice of appeal from the Judgment and Decree of the Court of Appeal at Kisumu (Githinji; Okwengu; Mohammed, JJ.A) in Election Petition No. 24 of 2018 dated 26 July 2018)*

**Considerations relating to extension of time for the filing of a notice of appeal at the Supreme Court.**

Reported by Beryl A Ikamari

*Civil Practice and Procedure*-appeals-filing of a notice of appeal-time within which to file a notice of appeal at the Supreme Court-considerations of the Court in an application for extension of time within which to file a notice of appeal-effect of a delay of 1 day in filing a notice of appeal-Supreme Court Rules, 2012, rule 31.

**Brief facts**

The applicant made an application for the extension of time within which to file a notice of appeal. The applicant stated that the notice of appeal was filed 1 day after the expiry of the 14 day time limit. He said that the delay was not inordinate and he would suffer immense prejudice if the notice of appeal was not admitted. The application was opposed by the respondents on grounds that the applicant had not demonstrated sufficient reasons for the grant of the orders sought and demonstrated that public interest justified the grant of the orders.



## Issues

1. Whether the Court would grant an extension of time within which to file a notice of appeal.

## Held

1. Rule 31 of the Supreme Court Rules, 2012 prescribed that a notice of appeal had to be filed within 14 days of the making of the judgment which was being appealed against. A notice of appeal informed the parties to a suit, especially the successful litigants that their gains could be cut short or delayed. It was fair for the parties to know within the shortest time possible whether to rest their litigious poise. It was consistent with the general rule that litigation had to come to an end.
2. Where a court reserved reasons for a judgment to a later date, time for filing the notice of appeal would run from the date of the decision, rather than the date when the reasons for the decision were issued.
3. A notice of appeal was a jurisdictional prerequisite. Whereas the final pronouncement by a court signified the end of litigation in a matter, the notice of appeal signified the intention to keep the matter alive. The role played by a notice of appeal could not be belittled especially in electoral matters where electoral justice was closely tied to the issue of timely resolution of disputes.
4. Considering the circumstances, especially the fact that case-filing rules were so crucial to the proper discharge of the Court's mandate, that the Registry remained accessible to the parties during vacations and that no time was available for entertaining the belated causes, it was appropriate to disallow the notice of motion.

*Application dismissed.*

## Orders

*We hereby disallow the applicant's Notice of Motion dated August 13, 2018.*

## Citations

### *East Africa*

1. *Munene, Mary Wambui v Peter Gichuki Kingara & 2 others* Application No 12 of 2014- (Explained)
2. *Salat, Nicholas Kiptoo Arap Korir v. Independent Electoral and Boundaries Commission & 7 others* Application No 16 of 2014- (Followed)
3. *Sawe, Patricia Cherotich v Independent Electoral & Boundaries Commission & 4 others* Petition No 8 of 2014 – (Followed)
4. *Tong'I, Richard Nyagaka v Chris Munga Bichage & 2 others* Petition No 17 of 2014 – (Followed)

## Statutes

### *East Africa*

1. Constitution of Kenya, 2010 article 163(4)(a) – (Interpreted)
2. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rule 31 – (Interpreted)

### *East Africa*

1. *Munene, Mary Wambui v Peter Gichuki Kingara & 2 others* Application No 12 of 2014- (Explained)
2. *Richard Nyagaka Tong'I v Chris Munga Bichage & 2 others* Petition No 17 of 2014 – (Followed)
3. *Salat, Nicholas Kiptoo Arap Korir v. Independent Electoral and Boundaries Commission & 7 others* Application No 16 of 2014- (Followed)
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4. *Sawe, Patricia Cherotich v Independent Electoral & Boundaries Commission & 4 others* Petition No 8 of 2014 – (Followed)

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## **RULING**

1. The Applicant has come before this Court on the basis of a certificate of urgency dated August 13, 2018, seeking the following orders:
  - a) That the Court be pleased to extend time to file a notice of appeal against the Order and Judgment of the Court of Appeal dated July 26, 2018.
  - b) That upon the grant of prayer (a) above, the Court be pleased to grant the applicant leave to file the notice of appeal out of time.
  - c) That upon the grant of leave, the Court be pleased to deem the Notice of Appeal dated 9<sup>th</sup> August, 2018 and filed on August 10, 2018, as filed within time and properly on record.
  - d) That the cost of this application be provided for.
  - e) Any such orders or further relief as the Court may deem fit.
2. The Applicant states that the Judgment in question had been delivered on 26<sup>th</sup> July 2018, and a notice of appeal was required by law to be filed within 14 days; but he filed it on 10<sup>th</sup> August 2018, one day after the expiry of the time limit.
3. The Applicant states in his Notice of Motion of 13 August 2018 that he had run out of time for lodging his notice of appeal, and that in his perception, the “delay was not inordinate”. He prays for an exercise of discretion by the Court, by extending the time allowed for filing the notice.
4. The Applicant states that he “stands to suffer immense prejudice if the notice of appeal is not admitted”; and that he stands to “be locked out of the relevant elective seat ... on account of the procedural technicalities ....”
5. The applicant’s advocate, Mr. Akenga Collins of M/s. Akenga Kimutai & Associates Advocates, has sworn a supporting affidavit averring that: “The appellant/applicant is desirous of having the matter heard and determined on merit ....”
6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents oppose the application on grounds that it is without merit and that the applicant has not demonstrated sufficient reasons why the Orders sought should be granted.
7. The 3<sup>rd</sup> respondent also opposes the application and urges that the applicant has not shown the public interest that would justify the grant of the Orders sought.



8. Rule 31 of the Supreme Court Rules, 2012 prescribes a 14- day period, after the delivery of the Judgment, within which to file a Notice of Appeal. In the case of Patricia Cherotich Sawe v. Independent Electoral & Boundaries Commission & 4 Others SC Pet. No. 8 of 2014; 2015 eKLR (Patricia Sawe case) we accentuated the importance of a Notice of Appeal and in that regard, we pronounced as follows para 28:

What is the objective purpose of the Notice of Appeal? It serves the important role of informing the relevant parties to the suit, especially the successful litigants, that their gains may be cut short, or delayed. It signals the intention to pursue an appeal. It is only fair that the parties, in the light of their legitimate anticipation, should know within the shortest time possible, whether to rest their litigious poise. It is consistent with the general rule guiding the judicial process: “litigation must come to an end.”

9. In this case, the petitioner had filed a Notice of Appeal out of time. We upheld the preliminary objection that sought to strike out the appeal that was premised on that Notice of Appeal and held as follows:

It is requisite, in the circumstances, to apply a broad-based principle regarding electoral matters, which this Court has pronounced in other cases: on account of the large public interest in electoral matters, all petitions in that regards, ought to take into account the prescribed timelines.”

10. In Richard Nyagaka Tong’I v. Chris Munga Bichage & 2 Others SC Pet. No. 17 of 2014; 2015 eKLR we held that even where a Court reserves reasons for Judgment to a later date, time for filing the Notice of Appeal runs as from the time of the decision, rather than that of the detailed reasons for the decision. In this case, the Court of Appeal had delivered its Orders without reasons and the appellant only filed a Notice of Appeal 14 days after the delivery of the reasons. In excusing the appellant’s mistake, we pronounced thus para 62:

The appellant has sufficiently explained, that the delay in giving reasons by the Court of Appeal made it impossible to formulate a competent appeal, to be filed with this Court under Rule 33(2)(a). It is evident that the appellant was at all times conscious of his obligation to file a competent petition, that meets the terms of Article 163(4)(a); and once the Court of Appeal rationalized the pertinent issues in written format on 4<sup>th</sup> April, 2014, he embarked on the pursuit of his right of appeal; in accordance with Rule 31(1) he filed a notice of appeal, and later, a petition of appeal under Rule 33(2)(a).”

11. In both of the above quoted cases, we recognized the importance of a Notice of Appeal particularly, in electoral matters. In Mary Wambui Munene v. Peter Gichuki Kingara & 2 others SC Appl. No. 12 of 2014; 2014 eKLR and Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others SC Appl. No. 16 of 2014; 2014 eKLR (Nick Salat case) the petitioners had filed the Notice of Appeal within time but failed to file the appeal within the requisite time. In both cases, the petitioners had first sought certification from the Court of Appeal before they abandoned the Appellate Court proceedings in favour of approaching the Supreme Court directly under Article 163(4)(a) of *the Constitution*. We extended time for filing the appeal. These two cases are distinguishable from the present case, where the applicant is seeking extension of time to file a Notice of Appeal.
12. We have held in the Nick Salat case that a Notice of Appeal is a jurisdictional pre-requisite. No appeal can be preferred without first filing a Notice of Appeal. Where else the final pronouncement by a Court signifies the end of litigation in a matter, a Notice of Appeal signifies the intention to keep the matter



alive. Hence, we cannot belittle the role played by a Notice of Appeal, and especially in an electoral matter such as this where electoral justice is closely tied to the issue of timely resolution of disputes. We are therefore inclined to follow the precedent set in the Patricia Sawe case.

13. Hence, upon considering the applicant's request, while taking into account all the relevant circumstances, and in particular the fact that the case-filing rules are so crucial to the proper discharge of the Court's mandate; that the Registry has always remained accessible to parties during vacations; and that no time is now available for entertaining belated causes – we hereby disallow the applicant's Notice of Motion dated August 13, 2018. We hereby issue Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF OCTOBER, 2018.**

**D. K. MARAGA**

**CHIEF JUSTICE/PRESIDENT OF THE JUSTICE OF THE SUPREME COURT**

**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

**J. B. OJWANG**

**JUSTICE OF THE SUPREME COURT**

**S. C. WANJALA**

**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

